

103  
**BLM AUTHORIZATION**

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Y 4. R 31/3: 103-27

**RING**

BLM Authorization, Serial No. 103-2... **ORE THE**

**SUBCOMMITTEE ON  
NATIONAL PARKS, FORESTS AND PUBLIC LANDS  
OF THE**

**COMMITTEE ON  
NATURAL RESOURCES  
HOUSE OF REPRESENTATIVES**

**ONE HUNDRED THIRD CONGRESS**

**FIRST SESSION**

**ON**

**H.R. 1603**

**TO AUTHORIZE APPROPRIATIONS FOR PROGRAMS, FUNCTIONS, AND AC-  
TIVITIES OF THE BUREAU OF LAND MANAGEMENT FOR FISCAL  
YEARS 1994 THROUGH 1997; TO IMPROVE THE MANAGEMENT OF THE  
PUBLIC LANDS; AND FOR OTHER PURPOSES**

**HEARING HELD IN WASHINGTON, DC  
MAY 25, 1993**

**Serial No. 103-27**

**Printed for the use of the Committee on Natural Resources**



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TUESDAY, MAY 25, 1993

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**H.R. 1603, TO AUTHORIZE APPROPRIATIONS  
FOR PROGRAMS, FUNCTIONS, AND ACTIVITIES  
OF THE BUREAU OF LAND MANAGEMENT  
FOR FISCAL YEARS 1994 THROUGH 1997;  
TO IMPROVE THE MANAGEMENT OF  
THE PUBLIC LANDS; AND FOR OTHER  
PURPOSES**

---

**TUESDAY, MAY 25, 1993**

**HOUSE OF REPRESENTATIVES,  
COMMITTEE ON NATURAL RESOURCES,  
SUBCOMMITTEE ON NATIONAL PARKS,  
FORESTS AND PUBLIC LANDS,  
*Washington, DC.***

The subcommittee met at 10 a.m. in room 1324, Longworth House Office Building, Hon. Bruce F. Vento presiding.

Mr. DEFAZIO. Good morning. We will begin the hearing.

Chairman Vento is still down at the White House, and hopefully they are working on his good arm and not his bad arm. So we are going to start the hearing so we can move along and not delay people too much.

Without objection, I will first enter a very astute statement by the Chairman as opening remarks into the record. No objection, that is entered.

[Opening statement of Mr. Vento follows:]

**OPENING STATEMENT OF HON. BRUCE F. VENTO**

The Subcommittee on National Parks, Forests, and Public Lands will come to order.

As Members have been advised, we are meeting today for a hearing on H.R. 1603, a bill to authorize appropriations for activities of the Bureau of Land Management (BLM) for the 4 fiscal years ending on September 30, 1997, and to improve the management of the public lands for which BLM has responsibility.

I am very happy that the Senate has now acted to confirm the appointment of Mr. Baca as Director of BLM. I know that we all look forward to hearing from him today. This will be his first appearance on this side of the Capitol as Director.

However, this morning Director Baca has a scheduling conflict. He and officials of the BLM are the sole witnesses testifying before the Senate Appropriations Subcommittee concerning BLM's appropriation for fiscal 1994—an appropriation that would be authorized by enactment of H.R. 1603.

the Senate Appropriations Subcommittee concerning BLM's appropriation for fiscal 1994—an appropriation that would be authorized by enactment of H.R. 1603.

Therefore, we will take the testimony of the other scheduled witnesses first, and then will hear from the Director after he concludes his appearance before the Senate Appropriations Subcommittee. If we have concluded with the other witnesses before the Director arrives, we will recess and then resume later today to hear from him.

The BLM is a very important agency of Government, with sole responsibility for management of some 270 million acres—about 13% of the total land surface of the Nation—and for administering mineral leasing and supervising mineral operations on an additional 300 million acres throughout the United States.

The basic law governing BLM's activities is the Federal Land Policy and Management Act of 1976—or “FLPMA”—sometimes referred to as BLM's “organic act.”

FLPMA provides for periodic reauthorization of BLM appropriations, but such reauthorization has occurred only once, and there has been no authorization for appropriations for most BLM activities since the end of fiscal 1982.

Since that time, in order for appropriations to be provided, it has been necessary for the House either to adopt a rule waiving the requirement of the House rules that appropriations be authorized, or—as was done last year—for the appropriations bill to provide that the funding is subject to enactment of authorizing legislation.

For several years, this committee and the House have been attempting to resolve this problem through enactment of a BLM reauthorization bill. The House passed such a bill in 1990, and again in 1991.

As Members who served in the last Congress are aware, the bill the House passed in 1991 provided for more than a simple reauthorization of appropriations.

Like the earlier version passed by the House, the 1991 bill included a number of other provisions intended to clarify BLM's mandate and improve the agency's ability to properly manage the public lands.

Those provisions were based on the continuing oversight work of the subcommittee and full committee during the 15 years since enactment of FLPMA, and also responded to judicial decisions and to the way FLPMA had been implemented by several administrations.

H.R. 1603 is similar in most respects to the House-passed bill of the 102d Congress, but there are some differences. For one thing, H.R. 1603 does not include the provisions related to grazing fees and other aspects of range management that were in the bill approved by the House in 1991. Instead, those and related provisions have been grouped into a separate measure, H.R. 1602, on which the subcommittee has already held a hearing.

It may be appropriate for these two bills to be joined into a larger measure later, but we have not reached the stage in the legislative process where that would occur, if it is to occur.

Another difference between H.R. 1603 and the House-passed bill of 1991, is that H.R. 1603 includes a new section—section 19—that would require the Secretary of the Interior to inform the Congress



whether there are portions of the public lands managed by BLM that should be considered for possible designation as national conservation areas.

In recent years, our committee has considered a number of such proposals. Several have been enacted into law, including the designation of the Le Malpais National Conservation Area in New Mexico, the Red Rock Canyon National Conservation Area in Nevada, and the San Pedro Riparian National Conservation Area and Gila Box Riparian National Conservation Area, both in Arizona. Earlier similar designations include lands in California and Alaska.

Just this month the House approved the bill of our colleague from Idaho, Mr. LaRocco, to give a statutory NCA designation to the Snake River Birds of Prey Area previously reserved by administrative actions.

In my opinion, the time has come to establish a more regular procedure for identifying which BLM lands might be appropriate for such designations, and to move toward more uniform management of national conservation areas. These are the objectives of section 19 of the bill before us.

Finally, let me mention one feature of the bill that is not new, but that is of continuing importance. That is section 14, which would amend FLPMA to address potential claims for rights-of-way based on a 19th-century law—later grouped into the revised statutes as section 2477, and so usually referred to as R.S. 2477—prior to that law's repeal by FLPMA in 1976.

Last year, to maintain the status quo on the ground while similar provisions were under consideration, the House's version of the fiscal 1993 appropriations bill included a moratorium on processing of such claims.

That moratorium was dropped in conference, but the conferees required submission from the Interior Department of a report on R.S. 2477 and its significance for management of the public lands. A draft version of that report has been made available to the public, and there is evidently, and properly, considerable public interest in this matter. It is my understanding that the final version of the report will be transmitted fairly soon.

Section 14 of H.R. 1603 is identical to the corresponding provisions of the bill the House passed in 1991. It may be that the information developed by the administration, and such recommendations as they may make, will lead to suggestions for revisions of that part of the bill, and I am sure such suggestions will be carefully considered.

I am hopeful that with the help of the Clinton administration, this year we can break the gridlock and enact a reauthorization measure for BLM. Certainly I intend to continue to work to achieve that goal, and in the process, to provide an opportunity for the Natural Resources Committee to properly exert its jurisdiction over the management of the public lands by resolving the policy disputes that in the past have too often been dealt with by the Appropriations committees both in the House and in the other body.

A copy of the bill and a fairly detailed description of its provisions are before each Member, so I will dispense with further description of it at this time.

In a moment, I will recognize other Members who wish to make opening statements, but first let me briefly outline the procedures we will follow today:

Without objection, the full statements of all witnesses will be included in the record as if read, and I will ask each public witness to summarize their testimony in no more than five minutes.

We will allow the witness on behalf of the administration to take more time if necessary, so that we may have a full explanation of the administration's views.

As usual, we have grouped some of the witnesses into panels, to expedite matters, and will hear from all witnesses on each panel before Members are recognized under the five-minute rule to question those witnesses.

If Members desire, we can have more than one round of questions. I will attempt to recognize Members in the order of their arrival at the hearing, in the usual rotation between majority and minority sides.

Now, let me recognize other Members who wish to make opening statements before we hear from our witnesses.

[Text of the bill, H.R. 1603, follows:]



103D CONGRESS  
1ST SESSION

# H. R. 1603

To authorize appropriations for programs, functions, and activities of the Bureau of Land Management for fiscal years 1994 through 1997; to improve the management of the public lands; and for other purposes.

---

## IN THE HOUSE OF REPRESENTATIVES

APRIL 1, 1993

Mr. VENTO introduced the following bill; which was referred jointly to the Committees on Natural Resources and Rules

---

## A BILL

To authorize appropriations for programs, functions, and activities of the Bureau of Land Management for fiscal years 1994 through 1997; to improve the management of the public lands; and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*  
3       **SECTION 1. AUTHORIZATION.**

4       There are hereby authorized to be appropriated such  
5       sums as may be necessary for programs, functions, and  
6       activities of the Bureau of Land Management, Depart-  
7       ment of the Interior (including amounts necessary for in-  
8       creases in salary, pay, retirements, and other employee

1 benefits authorized by law, and for other nondiscretionary  
2 costs), during fiscal years beginning on October 1, 1993,  
3 and ending September 30, 1997.

4 **SEC. 2. STATUTORY REFERENCE.**

5 As used hereafter in this Act, the terms "the Act"  
6 and "FLPMA" mean the Federal Land Policy and Man-  
7 agement Act of 1976 (43 U.S.C. 1701 et seq.).

8 **SEC. 3. FLPMA DEFINITIONS.**

9 (a) **AREAS OF CRITICAL ENVIRONMENTAL CON-**  
10 **CERN.**—Section 103(a) of the Act (43 U.S.C. 1702(a)) is  
11 amended to read as follows:

12 "(a) The term 'areas of critical environmental con-  
13 cern' means those areas (whether or not previously af-  
14 fected by one or more uses or developments) identified by  
15 the Secretary as areas where special management atten-  
16 tion is required (which, among other things, may in some  
17 instances include restrictions on or prohibitions of any fur-  
18 ther development) in order—

19 "(1) to protect important resources and values  
20 (including but not limited to environmental, ecologi-  
21 cal, historic, cultural, scenic, fish and wildlife, and  
22 scientific resources or values) located on or likely to  
23 be affected by the use of specific portions of the  
24 public lands (but Congress does not intend that the

1 Secretary establish protective perimeters or buffer  
2 zones around such areas);

3 “(2) to protect life and provide safety from nat-  
4 ural hazards; or

5 “(3) to protect or enhance the resources and  
6 values of a conservation system unit, but it is not  
7 the intent of Congress that the Secretary establish  
8 protective perimeters or buffer zones around con-  
9 servation system units.”.

10 (b) CONSERVATION SYSTEM UNIT.—Section 103 of  
11 the Act (43 U.S.C. 1702) is amended by adding at the  
12 end thereof the following new subsection:

13 “(q) The term ‘conservation system unit’ means any  
14 unit of the National Park System, National Wildlife Ref-  
15 uge System, National Wild and Scenic Rivers System, Na-  
16 tional Trails System, National Wilderness Preservation  
17 System, or a National Conservation Area, National Recre-  
18 ation Area, or National Forest Monument.”.

19 **SEC. 4. MAJOR USES AND INVENTORIES.**

20 (a) DEFINITION.—Section 103(1) of the Act (43  
21 U.S.C. 1702(1)) is amended—

22 (1) by striking “fish and wildlife development  
23 and utilization,” and inserting in lieu thereof “main-  
24 tenance of plant communities, maintenance of fish

1 and wildlife populations and habitat, utilization of  
2 fish or wildlife populations,"; and

3 (2) by striking "and timber production" and in-  
4 serting in lieu thereof "timber production, reforest-  
5 ation, and scientific research".

6 (b) INVENTORY.—Section 201(a) of the Act (43  
7 U.S.C. 1711(a)) is amended by striking the period at the  
8 end of the first sentence and inserting in lieu thereof "and  
9 riparian areas."

10 (c) MANAGEMENT DECISIONS.—Section 202(e)(2) of  
11 the Act (43 U.S.C. 1712(e)(2)) is amended by striking  
12 "the Congress adopts a concurrent resolution" and insert-  
13 ing in lieu thereof "there is enacted a joint resolution".

14 **SEC. 5. PLANNING REQUIREMENTS.**

15 (a) DEADLINES.—Section 202(a) of the Act (43  
16 U.S.C. 1712(a)) is amended—

17 (1) by designating section 202(a) as section  
18 202(a)(1); and

19 (2) by adding at the end of section 202(a) the  
20 following new paragraphs:

21 "(2) Land use plans meeting the requirements of this  
22 Act shall be developed for all the public lands outside Alas-  
23 ka no later than January 1, 1998, and for all public lands  
24 no later than January 1, 2000.

1       “(3) Land use plans shall be revised from time to  
2 time when the Secretary finds that conditions have  
3 changed so as to make such revision appropriate or nec-  
4 essary for proper management of the public lands covered  
5 by any such plan. The Secretary shall review each plan  
6 at least once every 15 years in order to determine the need  
7 for or appropriateness of revision of such plan pursuant  
8 to this paragraph.”.

9       (b) CRITERIA.—(1) Section 202(c)(1) of the Act (43  
10 U.S.C. 1712(c)(1)) is amended to read as follows:

11               “(1) use and observe the principles of multiple  
12 use and sustained yield set forth in this and other  
13 applicable law and evaluate the feasibility of meas-  
14 ures, consistent with such principles, that would en-  
15 hance the extent to which the public lands can sup-  
16 port increases in the numbers and types of plant  
17 communities and fish and wildlife populations lo-  
18 cated on or supported by such lands;”.

19       (2) Section 202(c)(3) of the Act (43 U.S.C.  
20 1712(c)(3)) is amended to read as follows:

21               “(3) give priority to the designation and protec-  
22 tion of areas of critical environmental concern and  
23 to identification, protection, and enhancement of the  
24 ecological, environmental, fish and wildlife, and  
25 other resources and values of riparian areas;”.



1 (3) Section 202(c)(5) of the Act (43 U.S.C.  
2 1712(c)(5)) is amended to read as follows:

3 “(5) consider present and potential uses (in-  
4 cluding recreational and other nonconsumptive uses)  
5 of the public lands;”.

6 **SEC. 6. PROFESSIONAL QUALIFICATIONS.**

7 Section 301(c) of the Act (43 U.S.C. 1731(c)) is  
8 amended to read as follows:

9 “(c) In addition to the Director, there shall be a Dep-  
10 uty Director and so many Assistant Directors, State Di-  
11 rectors, and other employees as may be necessary, ap-  
12 pointed by the Secretary. After May 1, 1989, no person  
13 may be appointed as Deputy Director of the Bureau (ex-  
14 cept for Deputy Director for External Affairs) or as an  
15 Assistant Director or State Director who is not at the time  
16 of appointment either a career appointee (as defined in  
17 section 3132(4) of title 5, United States Code) or in the  
18 competitive service. Other employees shall be appointed  
19 subject to provisions of law applicable to appointments in  
20 the competitive service, and shall be paid in accordance  
21 with the provisions applicable to such service.”.

22 **SEC. 7. PENALTIES.**

23 (a) FLPMA.—Section 303(a) of the Act (43 U.S.C.  
24 1733(a)) is amended by striking “no more than \$1,000”  
25 and by inserting “no more than \$10,000”.

1 (b) PUBLIC LAW 92-195.—Section 8 of Public Law  
2 92-195 (16 U.S.C. 1338(a)) is amended by striking “not  
3 more than \$2,000” and by inserting “not more than  
4 \$10,000”.

5 **SEC. 8. MANAGEMENT OF LANDS AND PUBLIC PARTICIPA-**  
6 **TION.**

7 (a) IN GENERAL.—The last sentence of section  
8 302(b) of the Act (43 U.S.C. 1732(b)) is amended to read  
9 as follows:

10 “In managing the public lands, the Secretary, by reg-  
11 ulation or otherwise, shall take any action necessary to  
12 prevent unnecessary degradation of such lands, to mini-  
13 mize adverse environmental impacts on such lands and  
14 their resources resulting from use, occupancy, or develop-  
15 ment of such lands, and to prevent impairment or deroga-  
16 tion of the resources and values of conservation system  
17 units.”.

18 (b) ADVISORY COUNCILS.—Section 309(a) of the Act  
19 (43 U.S.C. 1739(b)) is amended—

20 (1) by striking the period at the end of the first  
21 sentence and inserting in lieu thereof “, including  
22 the protection of environmental quality, the manage-  
23 ment and enhancement of fish and wildlife popu-  
24 lations and habitat, and outdoor recreation.”; and

1           (2) by striking the period at the end of the  
2       fourth sentence and inserting in lieu thereof “, who  
3       shall provide an opportunity for interested members  
4       of the public to suggest persons for appointment.”.

5       (c) ACEC REGULATIONS.—Section 310 of the Act  
6 (43 U.S.C. 1740) is amended by designating the existing  
7 provisions thereof as subsection (a) and adding the follow-  
8 ing new subsection:

9       “(b) By regulation, the Secretary shall provide an op-  
10      portunity for members of the public to propose specific  
11      areas for consideration for designation as areas of critical  
12      environmental concern pursuant to section 201 of this  
13      Act.”.

14   **SEC. 9. FUTURE REAUTHORIZATIONS.**

15       Section 318(b) of the Act (43 U.S.C. 1748(b)) is  
16      amended by striking “May 15, 1977, and not later than  
17      May 15 of each second even numbered year thereafter”  
18      and inserting in lieu thereof “January 1, 1993, and Janu-  
19      ary 1 of each second odd-numbered year thereafter”.

20   **SEC. 10. EXEMPTION FROM STRICT LIABILITY.**

21       Section 504(h) of the Act (43 U.S.C. 1764(h)) is  
22      amended by adding at the end thereof the following new  
23      paragraph:

24       “(3) No regulation shall impose liability without fault  
25      with respect to a right-of-way granted, issued, or renewed

1 under this Act to a nonprofit entity or an entity qualified  
2 for financing under the Rural Electrification Act of 1936,  
3 as amended, if such entity uses such right-of-way for the  
4 delivery of electricity to parties having an equity interest  
5 in such entity. However, the Secretary may condition the  
6 grant, issuance, or renewal of a right-of-way to such entity  
7 for such purpose on the provision by such entity of a bond  
8 or other appropriate security, pursuant to subsection (i)  
9 of this section.”.

10 **SEC. 11. CONGRESSIONAL REVIEWS.**

11 (a) **SALES.**—Section 203(c) of the Act (43 U.S.C.  
12 1713(c)) is amended by striking “and then only if the  
13 Congress has not adopted a concurrent resolution stating  
14 that such House does not approve of such designation”,  
15 and by inserting in lieu thereof “unless there is enacted  
16 a joint resolution disapproving such designation”.

17 (b) **WITHDRAWALS.**—Section 204 of the Act (43  
18 U.S.C. 1713) is amended as follows:

19 (1) By striking from subsection (c) the words  
20 “if the Congress has adopted a concurrent resolution  
21 stating that such House does not approve the with-  
22 drawal” and by inserting in lieu thereof “if prior to  
23 the end of such 90-day period there is enacted a  
24 joint resolution disapproving the withdrawal”.

1           (2) By striking from subsection (1)(2) the words  
2        “the Congress has adopted a concurrent resolution”  
3        and by inserting in lieu thereof “there has been en-  
4        acted a joint resolution”.

5   **SEC. 12. CONFORMING AMENDMENTS.**

6       (a) **REPEAL.**—Section 215 of the Act is hereby  
7   repealed.

8       (b) **GRAZING STUDY.**—Section 401 of the Act (43  
9   U.S.C. 1751) is amended by repealing subsection (a) and  
10   paragraph (b)(1), by redesignating paragraph (b)(2) as  
11   paragraph (a)(1), and by redesignating paragraph (b)(3)  
12   as paragraph (a)(2).

13   **SEC. 13. JUDICIAL REVIEW.**

14       (a) Title VII of the Act is amended by adding at the  
15   end thereof the following:

16                               **“JUDICIAL REVIEW**

17       **“SEC. 708. Any agency action or failure to act to im-**  
18   **plement this Act, including the whole or part of any agen-**  
19   **cy rule, order, license, sanction, relief, or the equivalent**  
20   **or denial thereof, shall be subject to judicial review in ac-**  
21   **cordance with and to the extent provided by the Adminis-**  
22   **trative Procedure Act (5 U.S.C. 551–559 and 701 et seq.).**  
23   **For the purposes of this section, the term ‘rule’ has the**  
24   **same meaning as such term has in the Administrative Pro-**  
25   **cedure Act (5 U.S.C. 551(4)).”**



1 (b) The table of contents of the Act is amended by  
2 inserting after the item relating to section 707 the follow-  
3 ing new item:

“Sec. 708. Judicial review.”.

4 **SEC. 14. CLAIMED RIGHTS-OF-WAY.**

5 The Act is hereby amended by adding at the end of  
6 title III the following new sections 319 and 320:

7 **“SEC. 319. RECORDATION OF CLAIMED RIGHTS-OF-WAY.**

8 “(a) **FILING REQUIREMENTS.**—(1) Any party claim-  
9 ing to be a holder of a right-of-way across public or other  
10 Federal lands for the construction of a highway pursuant  
11 to a grant made by Revised Statutes section 2477 (43  
12 U.S.C. 932) that became operative before repeal of such  
13 section on October 21, 1976, shall, on or before January  
14 1, 1994, file for record in the office or offices of the Bu-  
15 reau of Land Management responsible for management of  
16 public lands within the State or States wherein such  
17 claimed right-of-way is located either a notice of intent  
18 to hold and maintain the right-of-way or a notice of aban-  
19 donment of such party’s claim to be the holder of such  
20 right-of-way. A notice of intent to hold and maintain such  
21 a right-of-way shall be accompanied by information con-  
22 cerning the actual construction, maintenance, and public  
23 use on which such party bases its claim to have established  
24 such a right-of-way, and by such other information regard-  
25 ing the uses, location, and extent of such claimed right-

1 of-way as the Secretary of the Interior may require. The  
2 Secretary may allow information already in the possession  
3 of the Bureau of Land Management to be included by ref-  
4 erence to the documents in which such information is re-  
5 corded.

6       “(2) A party filing a notice pursuant to paragraph  
7 (1) shall also simultaneously file a copy thereof in the ap-  
8 propriate office of any other agency responsible for man-  
9 agement of any Federal lands traversed by the claimed  
10 right-of-way, and shall give public notice of the party’s in-  
11 tention to hold and maintain or to abandon the claimed  
12 right-of-way by publication of information concerning such  
13 intention in one or more newspapers of general circulation  
14 in the areas where the affected lands are located.

15       “(b) EFFECT.—(1) The failure of any party subject  
16 to the requirements of subsection (a) to file the notices  
17 or to publish the information required to be filed and pub-  
18 lished by such subsection within the time specified by such  
19 subsection shall be conclusively deemed to constitute an  
20 abandonment and relinquishment of a right-of-way with  
21 respect to which such filing and publication is required  
22 by such subsection.

23       “(2) Recordation pursuant to this section shall not,  
24 of itself, render valid any claim which would not otherwise  
25 be valid under applicable law or provide a basis for chang-

1 ing the scope, alignment, or character or extent of use of  
2 any claimed right-of-way; and nothing in this section shall  
3 be construed as waiving, altering, or otherwise affecting  
4 any terms or conditions applicable to any right-of-way  
5 under this Act or any other applicable law.

6 “(c) INVESTIGATIONS.—(1) Upon receipt of a notice  
7 filed pursuant to subsection (a) that a party intends to  
8 hold and maintain a claimed right-of-way involving any  
9 lands specified in paragraph (2) of this subsection, the  
10 Secretary of the Interior, acting through an appropriate  
11 officer of the Bureau of Land Management or (if any por-  
12 tion of a claimed right-of-way covered by this subsection  
13 is located within a unit of the National Park System) of  
14 the National Park Service, shall conduct an investigation  
15 to determine the validity of each such claimed right-of-  
16 way. The Secretary shall provide an opportunity for the  
17 public to contest or request an investigation of the validity  
18 of any other claimed right-of-way.

19 “(2)(A) The Secretary shall investigate the validity  
20 of each claimed right-of-way any portion of which  
21 involves—

22 “(i) any lands within the National Park Sys-  
23 tem, the National Wild and Scenic River System, or  
24 the National Wilderness Preservation System; or

1           “(ii) any lands being managed so as to preserve  
2       their suitability for designation as wilderness, pursu-  
3       ant to section 603 of this Act or any other provision  
4       of law or regulation; or

5           “(iii) any area of critical environmental con-  
6       cern; or

7           “(iv) any other lands whose use for highway  
8       purposes would be inconsistent with the land-use  
9       plans for those lands.

10       “(B) The Secretary shall also investigate any claimed  
11   right-of-way not involving lands specified in subparagraph  
12   (A) but with respect to which a challenge is filed that  
13   states grounds which, if proved or confirmed, would con-  
14   stitute reason to doubt the validity of such claimed right-  
15   of-way or any portion thereof.

16       “(3) If any portion of such claimed right-of-way is  
17   on Federal lands managed by an agency other than the  
18   Bureau of Land Management or the National Park Serv-  
19   ice, the investigating officer shall request the comments  
20   of such agency with respect to the validity of such right-  
21   of-way.

22       “(4) Appropriate notice to the public, including the  
23   owners of any non-Federal lands affected by the claimed  
24   right-of-way, shall be provided with respect to initiation  
25   of each investigation carried out pursuant to this para-

1 graph, and the investigating officer shall provide an oppor-  
2 tunity for the public to submit comments concerning the  
3 subject of the investigation.

4 “(5) If information or comments submitted to the in-  
5 vestigating officer demonstrate that there is a dispute as  
6 to any relevant facts with respect to the validity of a right-  
7 of-way subject to an investigation under this paragraph,  
8 the parties to such dispute shall be afforded an adjudica-  
9 tory hearing on the record with respect to such disputed  
10 issues of fact. Any such adjudicatory hearing shall be be-  
11 fore a qualified administrative law judge whose findings  
12 shall govern disposition of such issues of fact in any deter-  
13 mination concerning the validity of a claimed right-of-way,  
14 subject to administrative and judicial review under appli-  
15 cable provisions of law.

16 “(6) If after an investigation pursuant to this para-  
17 graph, the investigating officer finds either that a claimed  
18 right-of-way or portion thereof is valid or that there is rea-  
19 son to doubt the validity of such claimed right-of-way or  
20 portion thereof, notice of such finding and the reasons  
21 therefor shall be provided to the party claiming the right-  
22 of-way and to all other affected parties, including the pub-  
23 lic.

24 “(7) For purposes of this section, if any portion of  
25 a claimed right-of-way includes lands managed pursuant



1 to section 603 of this Act, that fact shall constitute a rea-  
2 son to doubt the validity of such portion of such right-  
3 of-way.

4       “(d) APPEALS.—(1) Any claimed right-of-way or por-  
5 tion thereof with respect to which it is found, pursuant  
6 to subsection (c), that there is reason to doubt the validity,  
7 shall be deemed to be invalid unless, within 30 days after  
8 such finding the party claiming the right-of-way has filed  
9 with the Secretary of the Interior an appeal of such find-  
10 ing, and the Secretary thereafter determines the right-of-  
11 way to be valid. Any party other than the party claiming  
12 the right-of-way, may intervene in any appeal filed under  
13 this paragraph in support of the finding of invalidity by  
14 filing with the Secretary a notice of such intervention  
15 within the period allowed for filing of the appeal.

16       “(2) Any finding by the investigating officer with re-  
17 gard to the validity or invalidity of a claimed right-of-way  
18 or portion thereof valid shall become final unless within  
19 30 days after such finding a notice of appeal of such find-  
20 ing is filed with the Secretary of the Interior.

21       “(3) Any decision by the Secretary with regard to an  
22 appeal under this subsection shall be made after the party  
23 claiming or contesting a right-of-way has been provided  
24 with the evidence upon which the investigating officer's  
25 finding regarding its validity or invalidity was based and

1 has been given an opportunity to respond, including an  
2 adjudicatory hearing on the record with respect to any dis-  
3 puted issues of fact. .

4       “(4)(A) Pending a final determination of validity with  
5 respect to a claimed right-of-way that is subject to an ap-  
6 peal under this subsection, the Federal land covered by  
7 such claimed right-of-way shall be managed in accordance  
8 with applicable law (including this Act) and management  
9 plans as if such right-of-way did not exist, except that  
10 such lands may continue to be used for lawful transpor-  
11 tation, access, and related purposes of the same nature  
12 and to the same extent as was properly permitted by the  
13 Secretary on the date of enactment of this section. Any  
14 such continued uses shall be subject to appropriate regula-  
15 tions to protect the resources and values of the affected  
16 lands.

17       “(B) Upon a final determination of invalidity with re-  
18 spect to a claimed right-of-way subject to an appeal under  
19 paragraph (3), Federal lands covered by such claimed  
20 right-of-way shall be managed in accordance with applica-  
21 ble law and management plans.

22       “(C) A determination by an investigating officer as  
23 to the validity or invalidity of a claimed right-of-way may  
24 be appealed to the Secretary by any person, provided such  
25 appeal is made no later than 30 days after the determina-

1 tion of the investigating officer. Any person filing such an  
2 appeal shall be afforded an adjudicatory hearing on the  
3 record with regard to any disputed issue of fact. Any deci-  
4 sion of the Secretary regarding such an appeal shall be  
5 subject to judicial review.

6       “(5) Any decision by the Secretary pursuant to this  
7 subsection shall be subject to judicial review under appli-  
8 cable provisions of law, but nothing in this subsection shall  
9 be construed as affording any right to seek or participate  
10 in any judicial proceeding by any party not otherwise enti-  
11 tled to seek or participate in such proceeding.

12       “(e) CHANGE IN USE.—Any change in the scope,  
13 alignment, or character of use of a valid right-of-way es-  
14 tablished pursuant to Revised Statutes section 2477 shall  
15 be subject to terms and conditions required by section 505  
16 of this Act or other applicable law.

17       “(f) SAVINGS CLAUSE.—Nothing in this section shall  
18 be construed as increasing or diminishing the require-  
19 ments of any applicable law with respect to establishment,  
20 construction, or maintenance of a highway for purposes  
21 of obtaining a valid right-of-way pursuant to Revised Stat-  
22 utes section 2477 prior to its repeal.

1 **"SEC. 320. RIGHT-OF-WAY IN ALASKA CONSERVATION SYS-**  
2 **TEM UNITS.**

3 "Nothing in this Act shall be construed as exempting  
4 any proposal for any construction on or change in the  
5 scope, alignment, or character or extent of use of any por-  
6 tion of any right-of-way claimed to have been established  
7 pursuant to Revised Statutes section 2477 on any lands  
8 within any conservation system unit in Alaska from the  
9 requirements of title XI of the Alaska National Interest  
10 Lands Conservation Act."

11 **SEC. 15. WILD HORSE SANCTUARY REPORT.**

12 (a) **WAITING PERIOD.**—The Secretary shall take no  
13 action to remove any animals covered by Public Law 92-  
14 195 (commonly known as the "Wild Free-Roaming Horses  
15 and Burros Act") from any area being operated, under  
16 an agreement with the Secretary, as a sanctuary for such  
17 animals on May 22, 1991, or to alter arrangements exist-  
18 ing on such date for care and maintenance of such ani-  
19 mals, sooner than 120 days after transmittal to the House  
20 Committee on Interior and Insular Affairs and the Senate  
21 Committee on Energy and Natural Resources of the report  
22 required by this section.

23 (b) **REPORT.**—(1) The Secretary of the Interior shall  
24 report to the committees specified in subsection (a) con-  
25 cerning the status of the sanctuaries specified in such sub-  
26 section and any alternative arrangements that the Sec-

1   retary may be considering to assure the continued long-  
2   term welfare of the wild horses located on such sanctuaries  
3   on May 22, 1991, with a detailed estimate of the costs  
4   and advantages or disadvantages of such alternatives as  
5   compared with continuation of arrangements in effect on  
6   such date for such animals.

7       (2) Prior to transmitting the report required by this  
8   section to the committees specified herein, the Secretary  
9   shall provide an opportunity for the public to make sug-  
10   gestions concerning the alternative arrangements to be  
11   discussed in such report, and to review and comment on  
12   the report.

13   **SEC. 16. TABLE OF CONTENTS AMENDMENTS.**

14       The table of contents of the Act is amended by insert-  
15   ing after the item relating to section 318 the following  
16   new items:

    "Sec. 319. Recordation of claimed rights-of-way.

    "Sec. 320. Right-of-way in Alaska Conservation System Units."

17   **SEC. 17. BONNEVILLE SALT FLATS.**

18       Not later than 2 years after the date of the enact-  
19   ment of this Act, the Secretary of the Interior shall con-  
20   duct a study to determine the nature and extent of the  
21   salt loss from the salt flat crust occurring at Bonneville  
22   Salt Flats, Utah, and how best to preserve the resources  
23   (including scenic, historic, economic, and recreational re-  
24   sources) threatened by such salt loss. In conducting the



1 study, the Secretary shall consider whether to designate  
2 the Bonneville Salt Flats as a national recreation area or  
3 a national conservation area. Within 90 days after the  
4 completion of the study, the Secretary shall submit a re-  
5 port to the Congress concerning such study, together with  
6 recommendations, if any, of the Secretary.

7 **SEC. 18. MANAGEMENT OF PUBLIC LANDS RELATING TO**  
8 **NATURAL PRODUCTIVE CAPACITY.**

9 Section 302(a) of the Act (43 U.S.C. 1732(a)) is  
10 amended—

11 (1) by inserting “(1)” after “(a)”; and

12 (2) by adding at the end thereof the following:

13 “(2) The Secretary shall manage the public lands to  
14 maintain and restore their natural productive capacity and  
15 shall take no action to diminish the long-term sustain-  
16 ability of the biological resource as measured by the vari-  
17 ety within and among the native species and communities  
18 of which it is comprised, except that where a tract of such  
19 public land has been dedicated to specific uses according  
20 to any other provision of law it shall be managed in ac-  
21 cordance with such law.”.

22 **SEC. 19. NATIONAL CONSERVATION AREAS.**

23 (a) **DEFINITIONS.**—As used in this section:

24 (1) “National Conservation Area” means a por-  
25 tion of the public lands—

1 (A) that contains notable natural, environ-  
2 mental, ecological, scientific, scenic, or cultural  
3 resources or values (or a combination thereof);

4 (B) that should be—

5 (i) retained in national ownership,  
6 withdrawn from mineral entry and from  
7 mineral and geothermal leasing, and not be  
8 managed to permit commercial harvesting  
9 of timber; and

10 (ii) managed for purposes of conserv-  
11 ing, protecting, and enhancing such re-  
12 sources or values; and

13 (C) where generally only such uses of the  
14 public lands as further such management pur-  
15 poses should be permitted.

16 (2) "Secretary" means the Secretary of the In-  
17 terior

18 (3) the term "public lands" and all other terms  
19 shall have the same meaning as such terms have  
20 when used in the Federal Land Policy and Manage-  
21 ment Act of 1976, unless otherwise specified in this  
22 section.

23 (b) IDENTIFICATION OF POTENTIAL NATIONAL CON-  
24 SERVATION AREAS.—

1           (1) As soon as possible after the date of enact-  
2       ment of this Act the Secretary shall undertake to  
3       identify any portions of the public lands, not pre-  
4       viously recommended for or designated as wilderness  
5       and not subject to specific management require-  
6       ments imposed by law, that would be suitable for  
7       designation as one or more National Conservation  
8       Areas.

9           (2) In the implementation of this subsection,  
10      the Secretary shall provide an opportunity for mem-  
11      bers of the public to make suggestions as to the  
12      matters described in paragraph (3) of this sub-  
13      section.

14          (3) No later than 3 years after the enactment  
15      of this Act, the Secretary of the Interior shall report  
16      to Congress concerning—

17            (A) any criteria, in addition to those speci-  
18      fied in this section, that should be utilized in  
19      order to identify a portion of the public lands  
20      that should be considered for designation as a  
21      National Conservation Area;

22            (B) any management requirements, in ad-  
23      dition to those specified in this section, that  
24      should be included in any legislation designat-

1           ing a portion of the public lands as a National  
2           Conservation Area; and

3                   (C) any portions of the public lands the  
4           Secretary has identified as suitable and that the  
5           Secretary recommends for designation as one or  
6           more National Conservation Areas.

7           (e) DESIGNATION.—No portion of the public lands  
8   shall be designated as a National Conservation Area ex-  
9   cept by Act of Congress

Mr. DEFazio. Without objection, all statements of all witnesses who will testify will be entered in the record in their entirety.

We will get to Mr. Orton in a moment as the first witness. First, the tradition is we poll the panel for opening statements.

And I recognize my colleague Mr. Hansen and he has an opening statement.

### STATEMENT OF HON. JAMES V. HANSEN

Mr. HANSEN. Thank you.

Mr. Chairman, I am pleased that we finally are able to hold a hearing on this bill.

My objections to this legislation are far too numerous to mention in an opening statement. This bill looks a lot like the ones in 1989 and 1991 that passed the House and died in the Senate Energy Committee.

H.R. 1603 would change the BLM from a multi-use agency to one that manages lands primarily for non-consumptive uses such as backpacking, birdwatching, and other recreational pursuits.

At the same time, it would create red tape for traditional industries like mining and livestock and they would be forced off public lands.

My greatest objections to this legislation deal with buffer zones, R.S. 2477 rights-of-way, and Section 19 dealing with national conservation areas.

In the 1980's, I was constantly in a hassle with Chairman Seiberling over the question of buffer zones. I remember debating it with Mr. Seiberling, and we never were able to come up with the definitions of certain terms like "adjacent to."

And I still remember John Seiberling saying that "adjacent to" was from Bryce National Park all the way to Las Vegas, which to me was a rather big interpretation of the words "adjacent to."

Many of these things have not been worked out, and I think we should move the BLM or park area to that line and not be involved in plowing the ground in something that we cannot understand.

Although the Chairman will assure us that Section 3 does not require BLM to create buffer zones around national parks, monuments, refuges, wild and scenic rivers and national trails, I have been advised by prominent attorneys that BLM will designate buffer zones to avoid litigation from environmental groups.

Since Utah is blessed with numerous parks, monuments, national trails, and wild and scenic rivers, Section 3 would result in a massive down-zoning of public lands at a time when public land access is already being limited as recognized by the Chairman.

Utah and Alaska are the two States most affected by Section 14 dealing with R.S. 2477 rights-of-way. As a result, it should come as no surprise that Congressman Orton and Barbara Hjelle of the Utah Association of Counties are testifying regarding that provision.

These rights of access have been consistently confirmed by the courts as a property right. To arbitrarily give holders of these rights 6 months to file a claim is an expensive, onerous, and unworkable burden on the BLM, local governments, and citizens who hold these rights. I assure you that this will be aggressively fought here and in the other body.



Section 17 mandates that a study be conducted as to why the Bonneville Salt Flats are shrinking. Although one study was already completed and came to no conclusions, I would welcome further analysis. I would not favor the Salt Flats being considered as a national recreation area or a national conservation area. Utah depends greatly on the activities conducted on the Salt Flats and I would oppose any efforts to restrict these uses.

I am also very concerned about the new section in this year's bill regarding national conservation areas. I favor the current management flexibility NCAs provide. This hybrid between wilderness and normal multiple-use public lands is a workable solution to competing interests.

I believe that our professional land managers within BLM have the abilities to balance diverse uses found within NCAs and do not need micromanagement from Washington, D.C. Bans on commercial timber harvest and mining within NCAs will only cause severe economic hardship on rural residents in public land areas.

Finally, I cannot support the extensive review of all BLM lands, except congressionally designated areas, to determine their suitability as NCAs. In my opinion, this review would only open old wounds from BLM's wilderness review required from FLPMA, not to mention costing the taxpayers millions of dollars to study areas that have already been studied to death. In one case in Utah, we have done 41 studies in one area. I recall that we did over 90 studies on the Great Salt Flats and drew no conclusions except that there are a lot of minerals.

I welcome our witnesses, especially those from Utah. And I look forward to hearing today's testimony.

Mr. Chairman, I would ask unanimous consent for the statement of Senator Orrin Hatch be submitted in the record.

Mr. DEFAZIO. As one of the witnesses? Is that the idea? For the record?

I understand.

Without objection.

[Prepared statement of Mr. Hatch follows:]

STATEMENT BY SENATOR ORRIN G. HATCH BEFORE THE HOUSE SUBCOMMITTEE ON NATIONAL PARKS, FORESTS AND PUBLIC LANDS, ON H.R. 1603, THE BLM REAUTHORIZATION BILL, MAY 25, 1993

Mr. Chairman, I appreciate the opportunity to provide brief comments on H.R. 1603, the Bureau of Land Management reauthorization bill, which is the subject of today's hearing. While the bill addresses several programs and activities under the jurisdiction of the BLM, my comments today focus on Section 14 of the bill dealing with federal law granting rights-of-way for constructing public highways over public lands, or Revised Statute 2477.

There are many issues currently being considered by Congress and the federal government that will have a direct impact on rural Utah. These include, but are not limited to, proposed increases in grazing fees, the imposition of a royalty on mining activities, unnecessary appeals on timber sales, designating wilderness, and the proposed increases in grazing fees, the imposition of a royalty on mining activities, unnecessary appeals on timber sales, designating wilderness, and the proposed energy tax.

But, as important as these issues are to my state, I believe the final disposition of rights-of-way claims under R.S. 2477 by the Congress could perhaps wreak just as much havoc and cause just as much disruption to the lifestyle of rural Utah as the issues I have already mentioned.

For this reason alone, section 14 of H.R. 1603 must be modified to take into consideration the concerns of most rural Utahans.

For example, establishing January 1, 1994 as a cutoff date on which municipalities and states must make an R.S. 2477 claim is inconceivable. There is simply too much work that local officials must undertake in order to document and justify claims before these claims can be adjudicated and granted by the BLM. This is especially true in Utah where the large majority of R.S. 2477 claims are currently outstanding and from which most future claims proposed to the BLM will be generated. A six-month deadline of six months or less is simply insufficient for these claims to be properly documented and presented to the BLM.

Additionally, the bill states that any party who does not make an R.S. 2477 claim within that timeframe shall be considered as completely abandoning and relinquishing a right-of-way claim. This one provision would completely strip counties and municipalities of their legal rights to access local public lands, granted to them for over 100 years, just because the local governments cannot meet an unworkable arbitrary deadline imposed on them by Congress.

All of this has come on the heels of the controversial BLM Draft Report to Congress entitled *The History and Management of R.S. 2477 Rights-of-Way Claims on Federal and Other Lands*. This report cited a Congressional Research Service (CRS) report 16 times, primarily on the question of what constitutes a "highway," a key term contained in R.S. 2477. It was this CRS report that caused several of us in Congress to write CRS Director Joseph Ross with questions about the accuracy of the report and to request that the report be withdrawn based on identified inaccuracies and inconsistencies in the report. CRS has not withdrawn the report as of today, and I can only assume that inaccurate information on this issue continues to be made available to my colleagues and the nation. Yet, it is this report which is a basis for the BLM report now before this committee.

The CRS report's major failure was not to address, or even acknowledge, an extensive literature on the law of ways extending back through early American and English common law to Roman civil law. This body of law contains clear definitions of "highway" as a public right to cross land belonging to another. For example, an 1868 treatise on highways, not mentioned in the CRS report, defines a highway as "a way over which the public at large have a right of passage, whether it be a carriage way, a horse way, a footway, or a navigable river." A contemporary English treatise, written in 1862, defined "highway" as "the general term applied to all public ways which include carriageways, cartways, horseways, bridleways, footways, causeways, churchways and pavements."

Under these definitions, many claims made by Utah's counties would qualify today as a "highway" under R.S. 2477. Yet, the CRS report does not mention them or other historic definitions that were obviously overlooked by the CRS. In my view, it is far more likely that Congress would have assumed these definitions rather than one that differentiates between "significant" types of access ways.

I am also concerned that H.R. 1603 provides the opportunity for the public to question or contest the validity of R.S. 2477 rights-of-way claims. This provision alone will ensure that most, if not all, of future claims are never adjudicated in a proper and timely fashion.

The issue of validity should be decided by the BLM based on the facts associated with each claim, and this validation should be granted upon demonstration by local government, either through pictorial, cartographic, or anecdotal documentation, that improved access was available to the public prior to 1976. The language in H.R. 1603 will unnecessarily disturb this validation process and prevent a legitimate local government need from being addressed promptly due to potentially frivolous appeals and delays.

On R.S. 2477 rights-of-way claims, I cannot help but believe the Congress is attempting to achieve a resolution on these claims despite the adverse impacts such a resolution would have on local governments, the entities with the most to lose. Very simply, the authority granted to local governments by Congress would be repealed with the passage of this bill and Section 14. I encourage this subcommittee to review this matter carefully and to work toward a proposal that is workable for local governments.

R.S. 2477 rights-of-way claims are not paths and tracks that rural countries are using to prevent the designation of wilderness in their areas. There is more at stake here. These paths, trails, and tracks are the way by which western public lands were settled and explored. Their role in this nation's history cannot, and should not, be overlooked by Congress, or dismissed without careful review. Today, these rights-of-ways form the primary infrastructure in western states, like Utah, with a significant amount of public acreage.

As Ray Lopeman, a county commissioner from Kane County, Utah, indicated to me last month, these roads are used to travel to and from work, to access farmland and livestock, to bus children to local schools, and "to conduct our [rural Utahns]



lives in a normal way. You [Senator Hatch] and urban America take these privileges for granted each day; we in rural America exist on them." In these words, Ray Lopeman has spoken for many other rural Utahns, succinctly stating the essential purposes of R.S. 2477 claims. The importance of R.S. 2477 rights-of-way to everyday living in rural America should not be minimized by this subcommittee or the Congress.

Mr. Chairman, the two issues at stake in Section 14 of H.R. 1603 are no less than 1) access, and 2) the freedom of local governments to conduct the affairs of their own communities. As one travels throughout Utah, these messages echo from county to county.

Utahns believe strongly that R.S. 2477 is a key element for achieving both of these objectives, which is why 96 percent of the current inventory of R.S. 2477 claims pending on BLM public lands are in Utah. Any legislative proposal *must* preserve the authority granted to local government through R.S. 2477 and *clearly* mandate that once a local government properly demonstrates that access was available to the public prior to 1976, then the BLM should grant a R.S. 2477 right-of-way without hesitation. I also believe the scope of the right should be preserved; in other words, local governments should retain the ability to make modifications to the rights-of-way to protect public access which in their judgment are reasonable and necessary.

H.R. 1603, in its attempt to bring the controversies surrounding R.S. 2477 rights-of-claims to an end, would cause more harm and create more problems than it would resolve. For this reason, I encourage this subcommittee to move slowly before adopting language that would issue another blow to rural life.

As Barbara G. Hjelle, a knowledgeable Utah attorney in this area who is testifying before the committee today, has stated in recent months, "actions designed, whether inadvertently or consciously, to modify or add conditions to [R.S. 2477] grants,...which have been continuously used for decades as an integral part of transportation systems, could have dangerous effects on the well-being of western communities.

I agree. Section 14 of H.R. 1603 is not the proper language at this time. I would be happy to work with the member of this subcommittee to fashion language that addresses the issue in a reasonable and workable manner and in a way that protects the livelihoods of rural Utahns and the rights of their local elected governments.

Mr. DEFAZIO. Mr. Thomas.

### STATEMENT OF HON. CRAIG THOMAS

Mr. THOMAS. Thank you, Mr. Chairman. I will make a short statement. We have a number of witnesses, and I am interested in particularly Jim Magagna, Public Lands Council, and those from Wyoming. I agree with Mr. Hansen's comments on this. Maybe the third time is the charm.

This bill is no different and equally unacceptable as the past one. We will find the same opposition that we had before. The last reauthorization expired in 1982. It might make sense to bring a clean reauthorization bill and get this behind us. But, instead, we will have the same as we had before. And we will have a wish list of special interests who are opposed to multiple use. And I am sorry for that. I am sorry we used this instrument to promote that.

Obviously, you mentioned a couple of things that are most difficult, phasing out the R.S. 2477 rights-of-way will be extremely expensive for local governments and not a good thing to do.

The buffer zone problem, I think, is maybe one of the most difficult issues that we have in terms of management.

As you say, Mr. Hansen this is kind of like the rancher who didn't want to expand much, he just wanted everything that was next to him. And that seems to be the way it goes here. There is no end to that.

Biological diversity seems to be a code word for talking about not utilizing the resources. And I am sorry for that, too.

So I do look forward to the witnesses, Mr. Chairman; and I hope that we could come out of here with a clean reauthorization bill. Thank you very much.

Mr. DEFAZIO. Mr. Calvert.

Mr. CALVERT. No opening statement, Mr. Chairman.

Mr. DEFAZIO. Okay. Thank you.

Apparently Members of the committee, but not the audience, have been advised that the new director of the BLM, Mr. Baca, has a conflict. I guess when you have a conflict and you have a choice between the House side and the Senate side, for whatever reason he chose to testify on the Senate side first. I can't understand that.

So we will hear first from our witnesses; and then when the director becomes available, we will insert him into the order. We will go to Mr. Orton first and other witnesses. I welcome our colleague.

Your statement in its entirety will be entered in the record. And if you would care to summarize, we would be appreciative.

### STATEMENT OF HON. BILL ORTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. ORTON. Thank you, Mr. Chairman.

I am appreciative to the committee for allowing me to come before you today and give my comments regarding proposed H.R. 1603.

Let me just explain to you so you understand what is included in my statement. I have a very detailed 10-page statement on the inadequacies of this legislation.

And attached to it, I have two addendums. One is a copy of comments made by myself and the Honorable Don Young, Member of the full committee, with regard to the CRS report issued in January on R.S. 2477 rights-of-way, and a copy of my comments on the draft BLM report on R.S. 2477 rights-of-way.

I believe the combination of these three documents will adequately outline the specific detail and the legal problems and inadequacies of this legislation.

I might just add my disappointment in the CRS with regard to the study issued in January. That study contained serious deficiencies and inaccuracies. Myself and Mr. Young, along with several other Members, submitted comments to CRS asking them to correct the report.

Not only were our comments ignored, but they were dismissed as though they were of no substance whatsoever. The report continues to stand, inaccurate as it is. And, in fact, the BLM has relied on that report in creating their draft report to this committee to assist you in drafting this particular legislation you are looking at.

And so the whole thing is flawed from Day 1. And I just want to go on the record as stating that I am seriously disappointed in the CRS for their total failure to even respond to the substantive challenges raised to that particular report.

Let me start out by saying if ever there were a bill to oppose, H.R. 1603 is it.

Aside from its blatant unconstitutionality and unlawful usurpation of States' rights, I have four other basic problems with this bill:

The improper policy shift which shifts the FLPMA policy from one of multiple use to non-consumptive use and environmental protection; the improper expansion of judicial review—the changes to issues of rightness and standing I believe are blatantly unconstitutional and contradicts Article III of the U.S. Constitution; the extinguishing of R.S. 2477 rights through the creation of a new recording procedure and notice procedures and a presumption of nonexistence of these rights and an unwieldy, outrageous appeals process; and finally, the redefinition of NCAs apparently to create de facto wilderness.

Let me very briefly explain each of these problem areas that I have. First, the shift in direction of the FLPMA policy from multiple use and sustained yield to an emphasis on environmental protection and enhancement of nonconsumptive uses; essentially, an elimination of development.

In my opinion, this policy shift is designed to simply create more wilderness, de facto, which does not meet the qualifications under the statute, under FLPMA itself, and also in essence to turn the rest of the public lands into buffer zones for national parks and newly created conservation units.

Second, I believe that this bill improperly, unlawfully, and unconstitutionally expands judicial review. It eliminates the requirement of finality and makes agency actions reviewable, which are not yet ripe for review.

One of the basic constitutional requirements for judicial review is that the action be ripe, it be ready for review. This particular area of H.R. 1096 in the last Congress had a problem. And Mr. Rhodes came to the Floor of the House, and with the Chairman, had a colloquy; and that bill was amended to specifically refer to the APA statute. That apparently resolved Mr. Rhodes' problems with that particular issue.

But it doesn't come anywhere near solving my problems with it. As we are identifying which agency actions are reviewable, by eliminating the word "final," in essence, it expands all agency actions. They don't have to be final or ripe or ready.

Someone could inject themselves into the middle of the BLM decision-making process before the BLM has even reached a final determination.

So I think that is totally improper. It also provides a cause of action under FLPMA that does not exist currently for good reason. The laws and the rights dealt with under FLPMA are not private rights. They are public rights. And the Constitution under Article 3 plainly sets out standing requirements which requires an individual, in order to intervene into an action, to have a direct loss. They have to be injured directly.

This statute overturns centuries of jurisprudence and justiciability. Federal courts are limited in their power to review cases in their controversies by Article 3. Article 3 requires proper standing, ripeness, and that the issue not be moot.

This particular——

Mr. VENTO [presiding]. We have given you the opportunity during the beginning of the hearing to present a statement. That courtesy is extended to Members for a brief statement at the beginning of the hearing. About five minutes is what we would like.



I would appreciate it if you would summarize your views and complete your statement in a couple of minutes.

Mr. ORTON. Okay. I will do that.

I would ask, in that case, that if the Members do not have the time to read my statement in detail, at least staff read it. There are problems too numerous to mention in this brief time.

Let me simply say that the other issues, the usurpation of R.S. 2477 rights-of-way is extremely critical. I believe this is counter-productive and costly. In fact, if you will indulge me for 1 minute I will give you one example of one county in my district. Two years ago the Bureau of Land Management issued an R.S. 2477 determination on the Buckhorn Road in Emery County. SUWA immediately appealed it.

Two years later there is still no decision on that particular road. That road has been maintained by county pursuant to a memorandum of understanding with the BLM for 10 years. H.R. 1603 would require the county to turn around and refile notice and intent on this particular road. The proposed construction on the road for safety purposes has long since been completed. The county would be foreclosed from improving the road in violation of Federal legal precedent.

This case illustrates just one example of the problems created by the new notice and appeals procedures on R.S. 2477.

That is one R.S. 2477 claim. Emery County has filed 1,100 such claims. Garfield County has filed over 1,500 claims. Those are 2 of 19 counties in my district; there are 30 States which have public roads which will be affected by this.

Let me conclude, Mr. Chairman, simply by saying that, in my opinion, this legislation completely ignores the Constitution and due process and simply attempts to take States' rights. It gives the government, the BLM, the power to predetermine existence of a right, to create new requirements and presumptions to create long delays and high costs to deem a right to be invalid and then act on the presumption and close roads, manage those lands as if the right doesn't exist, and then force States to take the Federal Government to court to prove that they actually have that right. The audacity astounds me.

Lest you misunderstand my comments to be support for this legislation, let me simply state that I would rather be dragged by my tongue 40 miles naked through the cactus than vote for this particular piece of legislation.

[Prepared statement of Mr. Orton follows:]

STATEMENT  
OF  
REPRESENTATIVE WILLIAM H. ORTON  
Subcommittee on National Parks, Forests and Public Lands  
May 25, 1993

If ever there were a bill to oppose, H.R. 1603 is it. Not only is this bill vague, over broad, over reaching, and terrible public policy, but I believe that it violates the United States Constitution on at least half a dozen specific grounds. While the bill raises numerous and insurmountable general concerns, my more specific concerns are twofold and are as follows: (1) H.R. 1603 charts a new course for the policy behind the Federal Land Management Act ("FLPMA") 43 USC §1701 et. seq. from one of multiple use and sustained yield to one of emphasized environmental protection and enhancement of non-consumptive uses; and (2) it inappropriately expands judicial review pursuant to FLPMA and opens the review process for RS 2477 right-of-way claims to allow non-substantive appeals by anyone, revising sound legal precedent and constituting an impermissible interference with statutory rights granted to the states over 100 years ago.

H.R. 1603 represents a clear intent to rewrite, revise and, in effect, repeal the underlying policy of FLPMA. In 1976, Congress passed FLPMA which repealed many of the miscellaneous laws governing disposal of public land and establishing a policy of favoring the retention of public lands for multiple use management.

In enacting FLPMA, Congress declared that it is the policy of the United States that the management of the public lands "be on the basis of multiple use and sustained yield unless otherwise specified by law." 43 USC §1701(a)(7). In my opinion, this legislation seeks to virtually abolish the multiple-use concept and, as such, not only undermines the stated policy of FLPMA but contradicts decades of well-established and demonstrably workable departmental administrative policy as well as clearly defined and well-reasoned legal precedent.

The term "multiple use" means the management of the public lands and their various resources so that they are utilized in the combination that will best meet the present and future needs of the American people. 43 USC §1702. The term "multiple use" does not mean management of the public lands for a single use, or no use at all, at the expense of all further development, as H.R. 1603 seems designed to do.

### INAPPROPRIATE SHIFT IN FLPMA POLICY:

Section 3 amends Section 1703(a) of FLPMA and places priority emphasis on and includes under the umbrella of protection "environmental" and "ecological" resources and the enhancement of resources and value of its newly created "conservation system units" and provides for the restriction and prohibition of further development.

Further, Section 3 broadens the scope of ACEC designation to include the protection of resources and values "likely to be affected" by the use of "specific portions of the public lands."

These amendments evidence an intent generally to eliminate commercial or economic uses such as timber, mining and grazing in favor of non-consumptive uses. H.R. 1603 gives special priority to single uses at the expense of multiple uses of public lands.

Similarly, H.R. 1603's amendments to Section 1712 of FLPMA dealing with the criteria for the development and revision of land use plans also evidences this intent. Section 5(3)(6) amends Section 1712(C)(1) of FLPMA to require, beyond the use and observation of the principles of multiple use and sustained yield, that the Secretary "evaluate the feasibility of measures . . . that would enhance the extent to which the public lands can support increases in the numbers and types of plant communities and fish and wildlife populations located on or supported by such lands," (emphasis added) all the while giving priority to not only the designation and protection of areas of critical environmental concern but to the identification, protection and enhancement of the ecological, environmental, fish and wildlife and other resources and values of riparian areas. Section 5(3) spells out the consideration of present and potential uses to include "recreational and other non-consumptive uses" of the public lands.

Section 8(a) expands the Secretary's duty to conserve public lands and creates a non-impairment standard for "conservation system units." As such, this section creates more wilderness without requiring the documentation of the wilderness characteristics previously incorporated by Section 603 of FLPMA. In fact, this section, through the expanded non-impairment standard, effectively turns all public lands into a buffer zone for national parks and other "conservation system units."

### IMPROPER EXPANSION OF JUDICIAL REVIEW:

Section 13, which replaced Section 14 in H.R. 1096, is intended to provide environmental plaintiffs with an avenue to sue where one is not otherwise available. It impermissibly relaxes the requirements for bringing suits imposed by Article III of the United States Constitution and eases and arguably eliminates requirements for review pursuant to the Administrative Procedures Act. 5 USC §§701-706 (1990)("APA").

Article III of the Constitution limits the scope of federal judicial power of review to "[c]ases and [c]ontroversies." U.S. Const., art. III, §2. The APA limits courts to review of federal agency action. Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Because FLPMA does not presently provide a private right of action for a violation of its provisions, a plaintiff must seek review under the general review provisions of the APA which provide for judicial review of "[a]gency action made reviewable by statute [which FLPMA does not so provide] and final agency action" . . . 5 USC Section 704. Therefore, when there is no specific authorization in the substantive statute (FLPMA) for review, and a plaintiff seeks review under the APA, the agency action in question must be "final." However, if Section 13 were interpreted to amend FLPMA to now provide a right of judicial review, albeit, "subject" to the APA, it would come within the Section 104 provision allowing review of "[a]gency action made reviewable by statute", thus eliminating the requirement of finality.

This section, as drafted, is the result of a last minute amendment on the floor presented by Mr. Rhodes from Arizona. It appears from the floor debate that Mr. Rhodes was concerned that this section, as previously drafted, would exempt agency actions under FLPMA from a number of significant protections against governmental abuse found in the APA. His amendment which specifically referenced the APA apparently satisfied his concerns, but does not begin to satisfy mine.

While the section was amended to add the language "subject to review" under the APA, other key terms were left out. Specifically, the term "final" preceding the terms "agency action" got lost in the translation. Mr. Rhodes' concerns did not address the real focus of this section which is to make actions not otherwise considered final, now reviewable in violation of the APA.

The real problem is that no analysis to date has addressed this amendment. The reasons provided in the last committee report may or may not be valid. On its face, this amendment appears to go much further than the original, H.R. 1096, in broadening the scope of judicial review. Absent the term "final" in Section 13, the amendment would make all agency actions including the formulation of policy and interpretative rules, which are not presently considered ripe for review under the APA, automatically reviewable. As such, Section 13 would contradict the constitutional requirements for judicial review imposed by Article III and would overturn a century of well-established, well-reasoned legal precedent defining the parameters of justiciability.

Section 13 is incorrectly cast by the Committee Report as a "response" to an invitation extended by the United State Supreme Court in Lujan v. National Wildlife Federation, 1105 Ct. 3177 (1990). Not only does Section 13 show up at the party uninvited, but it is inappropriately dressed. Moreover, the impact of Lujan on standing doctrine and its application to environmental plaintiffs is grossly exaggerated; there is, after all, life after Lujan. In Lujan, the NWF claimed that the BLM's administration of its "land withdrawal



review program" violated FLPMA and the National Environmental Policy Act of 1969 ("NEPA"). Since the plaintiffs in Lujan had alleged only that NWF members used "unspecified portions" of federal lands on which mining activity has occurred or probably will occur, the Court found that they had not demonstrated that they had been "adversely affected or aggrieved" by the BLM's actions. Id. at 3189.

In addition, and most important, the court in Lujan found that NWF's challenge to the BLM's entire "land withdrawal review program" was no more an identifiable "agency action" -- much less a "final agency action" -- than a "drug interdiction program" of the DEA. Id. In doing so, it stressed the importance of the requirement that the agency action being reviewed be final.

The court, in Lujan, simply reiterated its long-standing rule of law that plaintiffs pursuing review under the APA must demonstrate "actual or threatened harm" from a "final agency action" to have standing.

The court in Lujan flatly refused to allow NWF to seek the kind of "wholesale improvements" that Section 13 proposes to allow. Section 13 would allow review of all kinds of proposed agency actions before they are "ripe" for review, that is, ready to be decided. According to the Committee Report, these actions would include the development or adoption of policies to govern or direct agency action whether or not adopted by a formal rule-making proceeding which, by their nature, would be "less than immediate in their effects." Opening the doors of review to less than final agency actions and less than actual or threatened harm would be tantamount to opening the floodgates to litigation and the disruption of administrative procedure as we know it.

The bottom line, whether Congress thinks it is appropriate to allow judicial review right down to the BLM's thought processes or not, is that Section 13 as drafted, contradicts the constitutional requirements mandated by Article III and in doing so ignores the principles behind the evolution of standing requirements. Standing analyses has evolved as a combination of both constitutional considerations and prudential considerations which set forth the circumstances in which federal courts have subject matter jurisdiction. Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982). Since Article III's subject matter jurisdiction only extends to "cases and controversies" federal courts are limited to addressing adversarial questions and those capable of judicial resolution. As such, Article III limits the allocation of judicial power to federal courts so that the courts won't intrude on the other branches of government and thus acts as a check on the separation of powers. On this point, the Supreme Court has made it clear that "[n]either the Administrative Procedure Act, nor any other Congressional enactment, can lower the threshold requirements of standing under Art. III." Id. at 487-488 n.24. At best, Section 13 constitutes "judicial infringement upon the people's prerogative to have their elected representatives determine how laws that do not bear upon private rights shall be applied." Center for Auto Safety v. National Highway Traffic Safety Admin., 793 F.2 1322, 1342 (D.C. Cir. 1986)(Scalia, J., dissenting).



### USURPATION OF RS 2477 RIGHTS-OF-WAY:

As a preliminary matter, before addressing my specific concerns with Section 14, dealing with claimed rights-of-way and its accompaniment Section 319, I am particularly concerned that any legislative action which is taken involving RS 2477 rights-of-way, be based upon a fair, unbiased and detailed examination of the history of these rights, well-established judicial and administrative interpretation and an accurate assessment of the economic consequences accompanying any action affecting these rights. For this reason, I have attached to this statement, as an appendix, comments I submitted together with my colleague, the Honorable Don Young from Alaska, on the CRS REPORT (Highway Rights-of-Way: The Controversy Over Claims Under RS 2477) and my comments on the BLM DRAFT REPORT on RS 2477. These materials more than adequately address the various concerns I have relative to the two reports which have purported to address the issues surrounding RS 2477 claims.

To summarize, the CRS REPORT presents an inaccurate and biased analysis of these issues from which entirely unsubstantiated conclusions are drawn. It provides little evidence and mostly undocumented argument to support a preconceived hypothesis. Absent a fair and meaningful analysis and acknowledgement of the issues presented, the CRS REPORT does little to assist Congress and can only serve to manipulate and further confuse the issues. Because of serious concerns raised about the CRS REPORT's historical accuracy, legal analysis and lack of objectivity, Mr. Young and I, along with other members, requested that the CRS REPORT be withdrawn from further circulation and retrieved from those who already received it. Our request proved futile and was summarily rejected as if it were non-substantive. We received no response to the detailed substantive analysis set forth in our critique.

Unfortunately, the BLM DRAFT REPORT, with its extensive reliance on analysis and assertions made in the CRS REPORT, likewise undermines its credibility, objectivity, and ability to assist Congress in its evaluation of the issues. Accordingly, to the extent the BLM DRAFT REPORT relies on the CRS REPORT, it should also be disregarded. Viewing H.R. 1603, then, independent of any information contained in the two reports, I remain concerned about the following issues:

Section 319, as presented in the Committee Report, purports to provide a simple recordation requirement under the guise of the facilitation of federal land management. It is no more a simple recordation requirement than the wilderness inventory process was a simple inventory which the BLM had ten years to compete. Instead, it imposes elaborate procedural requirements, allows for exhaustive public participation in the process, provides an avenue to judicial review to virtually anyone -- eliminating established legal-standing requirements, and finally, it sets an impossible deadline for claiming rights which exist irrespective of any agency recognition, thus creating an "administrative dust storm that will choke BLM's ability to manage the public lands." Sierra Club v. Hodel, 848 F.2d 1068, 1082 (10th Cir. 1988).

A far cry from a simple recordation requirement, Section 319(a) sets forth the basic filing requirements for recordation of an RS 2477 claim. This section not only creates an administrative dust storm but also it envisions an administrative miracle. It is highly unlikely that the BLM would be able to complete even the promulgation of the minimal requisite implementing regulations within the meager seven months remaining to record claims, assuming, that is, that H.R. 1603 were passed into law as we speak. For example, Emery County, Utah, alone has just submitted 1,100 RS 2477 claims to the BLM for processing, which, due to the present moratorium on assessing the validity of these claims, pending the BLM's Report to Congress due on June 1, cannot begin to be processed. Add to this number the approximately 1,500 claims submitted by Garfield County, and then include the other 15 rural counties in my district alone, not to mention the likely claims that will follow from the other 30 public lands states trying to protect their highway systems, and the result is more than an "administrative dust storm" -- it is, at the very least, a full fledged tornado which will do more than just "choke" the BLM's ability to manage the public lands - it will more likely cause total respiratory failure. Section 319(a) is as counterproductive as it is costly, in that it would require the filing and defense of claims already long-since administratively determined as valid RS 2477 highways by the BLM.

Rewriting both well-established legal precedent and departmental policy, Section 319(a) goes on to place the added and misguided requirement of "maintenance" to the criteria for assessing an RS 2477 claim. The fact that, as a matter of policy, the expenditure of construction or maintenance money by an appropriate public body is evidence of the highway being a "public" highway does not translate into a fourth criteria for acceptance of the grant.

Section 319(b) provides that the failure to comply with these onerous recordation procedures and further the failure to file a notice of intent to "hold and maintain" an RS 2477 right-of-way and accompanying documentation, and to publish this information consistent with the time allotted in Section 319(a) "shall be conclusively deemed to constitute an abandonment and relinquishment of the right-of-way." As such, Section 319(b) rewrites and reverses traditional property law principles governing the extensive abandonment procedures that must be followed for public highways.

For example, Utah law specifically provides that all highways, roads, paths and ways not designated to another governmental entity are within the jurisdiction and control of the county commissioners in the county where they are located. Utah Code Ann. §27-12-25 (1992). Further, Utah law provides that all public highways once established shall continue to be highways until abandoned or vacated by the authorities having jurisdiction over any such highway. *Id.* §27-12-90. Extensive procedural requirements are then set forth which require notice and a public hearing. *Id.* §27-12-102 through 102.5. In Utah, the abandonment of a public highway, such as the literally thousands of RS 2477 rights-of-way, is a serious and sophisticated process. Such significant and valued property rights, integral to the infrastructure of the rural counties of Utah and other states, cannot be so easily slated for extinguishment in the yard sale fashion Section 319(b) provides.

Section 319(c) requires the automatic investigation by the Secretary of claims located in the National Park System, National Wild and Scenic River System, National Wilderness Preservation System, WSA's, and all ACEC's, and provides a catch-all of "any other lands, whose use for highway purposes would be inconsistent with land-use plans."

Section 319(c)(2)(B) requires that all other claims (as if there were any left) be investigated whenever a challenge to a claim is filed that would, if proved, constitute "reason to doubt" the validity of the claimed right-of-way. This provision allows anyone to submit a speculative or specious challenge which would then require an administrative determination of the level of proof and the degree of doubt -- standards which are obviously not readily definable.

Further, under Section 319(c) the Secretary must provide an opportunity to the public to contest or request an investigation of the validity of the claim -- an invitation for ill-willed and ill-founded interference. The section does not provide for or give a hint as to what the procedure for contesting a claim would involve. Traditionally, the only means available for contesting or clarifying property rights is a quiet-title action which is, by its very nature, limited to the parties involved. Nor does Section 319(c) provide direction as to the allocation of burdens or standards of proof governing claims made by the "public."

Section 319(c)(2)(B)(4) requires the Secretary to provide notice of the investigation to the public (presumably a different public than that contesting the claim) along with an opportunity for the public to submit comments on the investigation. If the comments submitted demonstrate that there is a "dispute" with respect to the validity of the claim (which would necessarily be the case automatically by virtue of the challenge to the claim) then the "parties" to the dispute shall be afforded an "adjudicatory hearing" on the record before an administrative law judge. The findings of fact from the hearing are then made subject to administrative and judicial review. §319(c)(2)(B)(5). Finally, if the investigating officer finds there is reason to doubt the validity of the claimed right-of-way, then there is, yet again, more notice to the parties and the public required.

This whole pointless procedure is so far afield from accepted practice and precedent under the Administrative Procedures Act to even be considered plausible. Each and every provision set forth in Section 319 contradicts long-standing administrative practice and raises serious constitutional concerns. First, the section provides notice ad nauseam -- notice of the filing of a claimed right-of-way; notice of a challenge to a claim; notice of an investigation; and notice of the findings of the investigation. Second, it eliminates both administrative and constitutional standing requirements by permitting carte blanche intervention in the process by persons other than the parties to the property dispute. Similarly, Section 319 allows administrative and judicial review of findings from the proceedings which would not otherwise be considered ripe for review under the APA or Article III, upsetting decades of justiciability doctrine.

Section 319(c)(2)(B)(7) creates a presumption (it is unclear whether it is mandatory or rebuttable) that any right-of-way located in a WSA creates a reason to doubt its validity when, in fact, the existence of a RS 2477 right-of-way within a WSA would create reason to doubt the validity of the WSA, and not the right-of-way. This provision is in direct conflict to the entire litany of federal case law evolving from the Burr Trail in Utah. See Sierra Club v. Hodel, 675 F.Supp 594 (D. Utah 1987), 848 F.2d 1068 (10th Cir. 1988), 737 F.Supp 629 (D. Utah 1990) (the "Burr Trail" case). Likewise, this section violates the savings provisions of FLPMA which makes it clear that valid existing rights were preserved when RS 2477 was repealed. FLPMA §§ 509(a) & 701(h), 43 USC §§1769(a), 1701. In this regard, the federal land manager's role is limited to the prevention of unnecessary and undue degradation to the servient estate. Hodel, 848 F.2d at 1083. In fact, the federal government's new uses of it's servient estate -- the creation of WSA's -- must not eviscerate the right-of-way holders' dominant estate. Id at 1087.

Finally, the real fun begins with Section 319(d). Following the exhaustive administrative process set forth above, the statute provides an appeal process which deems claimed rights-of-way automatically invalid if there is a "reason to doubt" its validity and the claimant does not appeal that finding within 30 days to the Secretary. This provision presents a novel twist on traditional principles of burdens of proof and raises serious Fifth Amendment concerns. Unlike in a criminal case where proof beyond a reasonable doubt is required to convict and trigger a deprivation of fundamental rights, subsection (d) makes just a reason to doubt sufficient to extinguish valid existing property rights without defining what quantum of proof is required, i.e., a good reason? any reason?

Section 319(d) then allows "any party" to intervene in the appeal to support the "invalidity" of the claim, but apparently would not afford the same right to anyone supporting the validity of the claim. Again, this section invites interference from any interested person regardless of motivation.

The most egregious aspect of this already constitutionally deficient section, is that Subsection (d)(4)(A) treats all right-of-way claims as if "such rights-of-way did not exist" pending the outcome of the appeal. How would it be, if whenever we disagreed with laws we could simply ignore them and pretend they didn't exist and operate instead consistent with our own interpretation of how things should be. Subsection (d)(4)(A) allows anyone who wishes, for whatever reason, to suspend valid existing rights, until the holders of those rights can afford both the time and money to litigate. However, Subsection (d) does allow the lands in question to be used for "lawful transportation," access and related purposes, presumably the same uses for which the RS 2477 grant was accepted in the first place although no definitions are provided for these terms. One can only guess as to what kind of transportation would be unlawful.

Subsection (d)(4)(C) allows "any person" to appeal a determination of validity or invalidity within 30 days of the decision, and all decisions are then subject to judicial review notwithstanding substantial legal precedent, as previously discussed, setting forth the



requirements for standing to intervene. First, this subsection permits a far more expansive basis for review than is provided under the APA. It also, arguably, would provide a private cause of action under FLPMA to challenge RS 2477 where none currently exists.

Subsection 319(e) requires a Title V permit for any "change in the scope, alignment, or character of use of a valid right-of-way." As such, it imposes restrictions on the otherwise valid uses of RS 2477 grants in direct contradiction to well-established legal precedent. See Hodel, 848 F.2d at 1088. (County cannot be compelled unwillingly to accept the markedly different rights conferred by FLPMA right-of-way permit in place of its current RS 2477 grant, nor can BLM deny the permit or impose conditions it might on ordinary right-of-way requests under FLPMA which would keep the County from improving the road.)

#### IMPROPER RESTRICTIONS ON NATIONAL CONSERVATION AREAS:

Finally, Section 19. NATIONAL CONSERVATION AREAS, significantly changes the definition, scope, and purpose of current law and practice regarding the establishment of National Conservation Areas.

I believe the definitional language contained in H.R. 1603 is far too restrictive. I would suggest that Sec. 19 (a) be amended to read as follows:

Sec. 19(a), DEFINITIONS, as used in this section:

(1) "National Conservation Area" means a portion of the public lands--

(A) that contains notable historical, scenic, archaeological, environmental, biological, cultural, scientific, educational, recreational, economic, geologic, ecological, wilderness, riparian, aquatic, wildlife, paleontological and natural resources and values, as well as, in some cases, close proximity to National Parks or Monuments."

The primary concept of a National Conservation Area is to protect and conserve nationally significant natural and cultural resources while allowing compatible uses to continue. The NCA concept was developed as a viable alternative to more intensive single use management schemes. Each NCA is managed under a detailed resource management plan developed specifically for each area, with public input, and following the overall guidance given to the agency by Congress in the enabling legislation. The BLM, through the management plan, determines administratively the mix of land uses which will best meet the goals established by Congress for each of these individual areas. It is anticipated that some portions of these areas will be maintained under roadless designation, or where appropriate withdrawn from mineral entry and harvesting of timber, but such designations will be made administratively by the BLM as part of the resource management plan, under the guidance given by Congress, and not by legislation.

Section 19(a)(1)(B) mandates withdrawal of NCA's from mineral entry and commercial harvesting of timber and restricts uses to conservation and protection only. With the exception of the statutory requirement that wilderness areas be "roadless", this applies the basic wilderness requirements, to " National Conservation Areas " thus appearing to create NCA's as defacto wilderness areas.

In order to maintain continuity with the original concept of National Conservation areas, I recommend that Sec. 19(a)(1)(B) be amended to read as follows:

Sec. 19(a)(1)(B) "that should be--

(i) retained in national ownership, and all compatible uses of such lands shall be permitted unless specifically prohibited by Congress or by the resource management plan developed under the guidance of Congress for each individual area.

(ii) managed for purposes of conserving, protecting, developing, enhancing and managing such resources or values for which each of the NCA's shall have been specifically created.

Sec. 19(a)(1)(C) [Should be omitted].

## SUMMARY

In conclusion, there are constitutional limitations on the extent to which Congress may delegate authority to an agency to adjudicate claims properly within the province of the courts. Since Article III's subject matter jurisdiction only extends to "cases and controversies", federal courts are limited to addressing adversarial questions and those capable of judicial resolution. The Congress does not have power to extinguish valid existing rights. This legislation ignores each of these limitations and improperly attempts to eliminate rights granted to the states over 100 years ago.

I urge the Committee to limit the scope of this legislation to the reauthorization of the Bureau of Land Management and to avoid the inappropriate FLPMA policy changes, improper expansion of judicial review, usurpation of RS 2477 Rights-of Way, and improper restrictions on National Conservation Areas contained in H.R. 1603.

Mr. VENTO. Other than that, you are for it; is that right? Well, I take your gratuitous statements with some umbrage, Mr. Orton. I don't look at this as a serious essay on the evaluation of the legislation. I think it must be done for some other reason. I fail to understand.

The good judgment that usually monitors the judgments and statements from the gentleman from Utah seems to have completely left and taken flight, based on the statements and fantasies and, I would say, almost ridiculous statements made concerning the legislation that is before the gentleman.

I just am astounded at the rather gratuitous and offensive statements made by the gentleman from Utah concerning this. I think we ought to go back and review this; this is out of the ordinary; it's extraordinary, uncalled for. And I am offended by the statements of the gentleman in terms of this and the work that has been done by this gentleman for the last five or six years on BLM, simply because the gentleman from Utah apparently sees some political plus or mileage.

In terms of the gentleman's comments with regards to this, I don't know where you are coming from or why you have taken this particular posture, but it is not one that speaks to positive, constructive work with regards to this subcommittee or the work of this gentleman from Minnesota.

There may be points in this that can be dealt with, but I think in the main, the gentleman has obviously stated a position far and opposed and outside the normal discussion and legislative committee work that I have experienced in my time here for 17 years.

So I don't know what the point is here in pursuing any questions from you, because I just think it was uncalled for, and it is inaccurate as it is offensive to me.

Are there any other questions?

Mr. ORTON. Could I respond to that?

Mr. VENTO. No. The gentleman has had his time.

The gentleman from Utah, Mr. Hansen.

Mr. HANSEN. Mr. Chairman, I can see that the emotions are getting high on this particular point. And I am sure that you have to realize that Mr. Orton feels very strongly, as I do, about the people in Utah who feel that they have been unjustly dealt with.

We have had people there, five-, six-generation ranchers, miners and other people. And I think before we get too judgmental on both sides of this issue, that Mr. Orton's work is significant, and he spent an awful lot of time on it.

And I am looking forward to reading your work, and I will look forward to doing that. And I would hope that we all calm down and shake hands and move ahead with this hearing, because I don't think there was anything personally at all involved in this, as I have known Mr. Orton for a number of years. He is an outstanding person and works diligently and becomes knowledgeable.

I don't want to get in the middle of this, but I appreciate the work that you have done and look forward to reading it.

Mr. ORTON. Would the gentleman from Utah allow me to respond?

Mr. HANSEN. Yes, I would be happy to.

Mr. ORTON. Let me simply state to this committee that there is nothing personal in this. It is not for some political purpose. It is not a political statement.

I have great respect for the Chairman and for his work. I have great respect for the Chairman's opinions, as I would hope the Chairman and the committee would have for mine.

Let me say that this is not simply an unknowledgeable attack on this legislation. I and my staff have spent hundreds, hundreds of hours in researching this legislation, FLPMA, predecessors, in determining the legal analysis of the particular problems and issues raised by this legislation.

In light of the comments of the Chairman, I would request that the Chairman and his staff actually read my statement in total and respond to me with inaccuracies of my legal interpretation of the statute.

And, in fact, if my interpretation is inaccurate, I would be happy to appear before this committee and withdraw any of those comments. I believe that these comments, in fact, are accurate, are based on statute, are based on the Constitution. It is, indeed, based upon my interpretation of this particular legislation.

It has nothing to do with a personal attack of the integrity or the honesty or the work that the Chairman or this committee has done. It is simply an analysis of the breadth of this particular piece of legislation, which I have very, very serious concerns about and the impact that it would have on the people that I represent in the State of Utah.

And so that is the context in which I submit my comments. I apologize to the Chair that he takes umbrage at my analysis of the legislation. But it is my honest analysis and is not meant to offend.

So I thank the Chairman and the committee for the opportunity of being here.

Mr. VENTO. The gentleman from Oregon, Mr. DeFazio, who I thank for opening up the hearing; does the gentleman have any questions for Mr. Orton?

Mr. DEFAZIO. No.

Mr. VENTO. Others?

Mr. LaRocco.

Mr. LAROCO. I don't have any questions. I just want to welcome the Secretary of State of the great State of Idaho, Mr. Chairman.

Mr. VENTO. And I would say before I dismiss Mr. Orton this morning, that the gentleman is entitled to his own opinions. You are not entitled to your own facts. And when you represent as facts various elements in this bill which, in essence, are your opinions or interpretations of what is intended or the consequence, that is why I take umbrage.

I understand that your interpretations are your own. That is fine. But I would say that I try to balance them based on what I know in terms of writing this and having worked on this for a long time.

I will read your statements. I will read your statements. And I will analyze your statements. And I understood what you said. And I think you ought to read your own statements and look at your own record here this morning in terms of what you said.

Thank you. You are dismissed.



As Mr. DeFazio said in opening the meeting—and I appreciate, again, his willingness to do it—Mr. Baca, who has recently been confirmed, is in the Senate to deal with appropriations. So I want to move to the list of witnesses that we have and perhaps interrupt at the end of a panel to ask for the participation of the new director of the BLM, Mr. Baca.

**PANEL CONSISTING OF PETE T. CENARRUSA, SECRETARY OF STATE, STATE OF IDAHO; BARBARA HJELLE, UTAH ASSOCIATION OF COUNTIES; DAVID J. SIMON, NATIONAL PARKS AND CONSERVATION ASSOCIATION; AND CYNTHIA SHOGAN, SOUTHERN UTAH WILDERNESS ALLIANCE**

Mr. VENTO. We are pleased to welcome the Honorable Pete Cenarrusa, the Secretary of State of the State of Idaho; Mrs. Barbara Hjelle, Utah Association of Counties; David Simon, National Parks and Conservation Association; and Cynthia Shogan, Southern Utah Wilderness Alliance.

Thank you for your patience this morning. Your complete statements will be made a part of the record. I will ask each of you to conclude your statements in five minutes. I know that all of your statements are important, but the Members and I do personally read over statements afterwards to try to analyze them for the impact.

I guess Mr. LaRocco has already welcomed his Secretary of State from the State of Idaho. Does the gentleman want to say anything further?

Mr. LAROCCO. Mr. Chairman, I do want to acknowledge Pete Cenarrusa, a long-standing public servant in the State of Idaho and a great Secretary of State and a friend of mine. I welcome him here, and I have read his testimony, and I think it would be enlightening to the committee.

Pete, welcome to the Natural Resources Committee. It is good to see you here in Washington, DC.

Thank you for that, Mr. Chairman. And I have a unanimous consent request that I will make at the proper time.

Mr. SMITH. Will the gentleman yield to me?

Mr. LAROCCO. Yes.

Mr. SMITH. I would like to welcome Mr. Cenarrusa. I had the privilege of eating in his son's restaurants many times, both in Oregon and in Idaho. And although Mr. Cenarrusa and I have never met, I have been a long admirer of him and his work in Idaho, and I am delighted to see him. And I will tell John that you are in good shape.

Mr. LAROCCO. Reclaiming my time.

I think when we were out for the Birds of Prey legislation, we took the Chairman to Onate to enjoy good Basque food. And I fell in love with a Basque woman, and the rest is history. The Basque people have a proud heritage in Idaho, the largest population of Basques outside the Basque region in Spain.

Mr. VENTO. I thank the gentleman for his hospitality and Mr. Cenarrusa for his recipes and the food. I very much enjoyed that experience in Idaho as well as others on that visit.

Why don't you proceed with your statement, Mr. Cenarrusa, please, for 5 minutes. Thanks.

## STATEMENT OF PETE T. CENARRUSA

Mr. CENARRUSA. Thank you, Mr. Chairman, Congressman LaRocco.

I am in the sheep business, and my son told me that the only way to sell lamb is by the plate; so he went into the restaurant business.

Mr. Chairman and Members of the Committee on National Parks, Forests and Public Lands, thank you for the opportunity to make this presentation with respect to H.R. 1603.

My remarks will pertain to R.S. 2477 rights-of-way. The State of Idaho recognizes that existing Federal lands rights of way are extremely important to all citizens of Idaho.

In addition, as a member of the State Board of Land Commissioners, I can say that it is important to the State of Idaho and to the schoolchildren of the State of Idaho to comply with the State constitution which provides a mandate to acquire the maximum amount of financial gain for the public school endowment and other institutional endowments.

Therefore, it is important that State lands have public access in the case of land-locked, isolated parcels of State lands. Two-thirds of Idaho's land is under the control of the Federal Government, and access to such Federal lands is integral to public use.

The Idaho Department of Lands manages over two and a half million acres of surface ownership of State trust lands with the State of Idaho. Much of the State ownership is now, or has been, intermingled with Federal lands. Primary uses of the land include livestock grazing, timber harvesting, mining, and recreational activities.

State lands are open to the public for general recreational uses. The State of Idaho sells endowment lands from time to time, and without access, they have very little value. Obviously, access to State trust lands is of primary importance to the State and other lessees and prospective buyers.

R.S. 2477 rights-of-way are an important and valid method of securing that access in some cases. Federal actions regarding R.S. 2477 can have a significant impact regarding management of the State lands and their resources.

We urge the Congress to take no action that would limit the State, their lessees, or the public's opportunity to access the State lands. We request that we be heard regarding any legislation which may diminish the management of State lands for the purposes that they were intended.

The Idaho legislature recognizing the necessity for establishing a procedure for identifying lands confirming the existence of previously established Federal rights-of-way, to protect those rights previously granted to and vested in the citizens of Idaho.

My principal concern with H.R. 1603 is that it sunsets filing for R.S. 2477 rights-of-way on January 1, 1991. This doesn't give the people of Idaho enough time in which to make such filings. Many of our roads are still snow-covered and not visible. A group of citizens representing the State of Idaho legislature, the Blue Ribbon Coalition, an advocate of public access roads and natural resource development and conservation, the Farm Bureau, natural resources representatives, Grassroots for Multiple Use, and my office have

filed for the record an amended version of H.R. 1603 marked Exhibit Number 1. We hope that your committee will favorably consider the amended version.

But foremost, we favor states' administration by State law. The 52nd session of the Idaho legislature enacted House Bill 388 into law March 25, 1993, signed by Governor Cecil Andrus.

The past legislature passed legislation and approved a memorial to Congress which I have submitted for the record.

House Bill 388 is marked Exhibit Number 2, and House Joint Memorial is Exhibit Number 3.

The statutory legislation defines Federal land rights-of-way within the context of Revised Statute 2477. The statutory language speaks of the method of abandonment of such roads or rights-of-way.

New State law also spells out the method of recordation and acknowledgment of R.S. 2477 roads within the State of Idaho. Since the issue is primarily one of States' rights, the Idaho legislature urges Congress to recognize the legislation as such in House Bill 388 passed by the 52nd Idaho Legislature.

Therefore, we in Idaho prefer States' rights with respect to roads and rights-of-way administered by State law rather than congressional legislation as proposed in H.R. 1603.

I have submitted for the record more detailed testimony. I thank you very much for this opportunity to appear before this august subcommittee of the 103d Congress.

Thank you.

Mr. VENTO. Thank you Mr. Cenarrusa and we will get back with a question or two in a minute.

[Prepared statement of Mr. Cenarrusa follows:]

TESTIMONY BEFORE THE HOUSE OF REPRESENTATIVES  
SUB COMMITTEE ON  
NATIONAL PARKS, FORESTS AND PUBLIC LANDS  
103RD CONGRESS OF THE UNITED STATES

BY  
PETE T. CENARRUSA  
SECRETARY OF STATE  
STATE CAPITOL  
BOISE, IDAHO

MAY 18, 1993  
10:00 A.M.

Mr. Chairman and member of the Committee on National Parks Forest and Public Lands. Thank you for the opportunity to make this presentation with respect to H.R. 1603.

The State of Idaho recognizes that existing federal land rights of way are extremely important to all of Idaho's citizens. In addition as a member of the State Board of Land Commissioners, I can say that it is important to the State of Idaho and to the school children of the State of Idaho to comply with the State Constitution which provides a mandate to acquire the maximum amount of financial gain for the public school endowment and other institutional endowments. Therefore it is important that State lands have public access in the case of land locked isolated parcels of State lands.

Two-thirds of Idaho's land is under control of the federal government and access to such federal lands is integral to public use.



The Idaho Department of Lands Manages over two and one-half million acres of surface ownership of State trust lands with the State of Idaho.

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Primary uses of the land include livestock grazing, timber harvesting, mining, and recreational activities. State lands are open to the public for general recreational uses.

The State of Idaho sells endowment lands from time to time and without access they have very little value.

Obviously, access to state trust lands is of primary importance to the State and our lessees and prospective buyers.

R.S. 2477 rights of ways are an important and valid method of securing that access in some cases.

Federal actions regarding R.S. 2477 can have a significant impact regarding management of state lands and their resources.

We urge Congress to take no action that would limit the state, their lessees, or the public's opportunity to access state lands.

We request that we be heard regarding any legislation which may diminish the management of state lands for the purposes they were intended.

The Idaho Legislature recognizes the necessity for establishing a procedure for identifying land confirming the existence of previously established federal rights of way, to protect those rights previously granted to and vested in the citizens of Idaho.

My principle concern with H.B. 1603 is that it sunsets filing for R.S. 2477 rights of way on January 1, 1994. This does not give the people of Idaho enough time in which to make such filings many of our roads are still snow covered and not visible.

A group of citizens representing the Idaho Legislature, the Blue Ribbon Coalition, an Advocate of Public access roads and Natural Resource Development & Conservation, the Farm Bureau, Natural Resources representatives, Grassroots for Multiple Use, and my office have filed for the record, an amended version of H.R. 1603 marked Exhibit No. 1. We hope that your committee will favorably consider the amended version. But foremost we favor states' administration by State law.

The 52nd Session of the Idaho Legislature enacted H.B. 388 into law March 25, 1993, signed by Governor Cecil D. Andrus. The past Idaho Legislature, not only passed statutory legislation, it also approved a memorial to congress which I have submitted for the record.

H.B. 388 is marked Exhibit No. 2 and House Joint Memorial No. 6 is marked Exhibit No. 3 herewith.

The statutory legislation defines "Federal land rights of way" within the context of revised statute 2477.

The statutory language speaks to the method of abandonment of such roads or rights of way. New state law also spells out the method of recordation and acknowledgement of R.S. 2477 roads within the State of Idaho.

Since the issue is primarily one of state's rights, the Idaho Legislature urges congress to recognize the legislation as such in H.B. 388 of the 52nd Idaho Legislature.

Therefore we in Idaho prefer State's rights with respect to roads and rights of way administered by State law rather than Congressional Legislation as proposed in H.R. 1603.

I have submitted for the record more detailed testimony.

I thank you very much for this opportunity to appear before this August Sub Committee of the 103rd Congress.

To continue on with my testimony I herewith submit to the Sub Committee testimony in the words of Mr. Phillip Nisbet from "Grassroots for Multiple Use" who serves on our Ad Hoc committee.

"For the record, I am submitting additional testimony. I have reviewed the proposal by Congressman Bruce Vento on H.R. 1603 with respect to H.R. 2477 Rights of Way. Please consider the following:

1. The issue is primarily one of State's rights.

- a. H.R. 1603 attempts to impose an abandonment procedure for roads and rights of way involved in intra state travel. The US Constitution is quite specific in delegating only the right to regulate interstate travel within the federal venue. Travel internal to the jurisdictional boundaries of a state has been viewed as a state's right and has only been restricted by the courts where individual rights might be involved. The current issue is not related to individual rights, but rather is one in which the federal government seeks to impose its collective will against the rights of individuals and the various public lands states.

- b. Rights of way are property rights. Existing federal law does not leave the federal government much latitude for acting as a repository of land ownership information.



Since the closing of the federal governments General Land Offices, the states and counties have been the place for recordation of titles to property. Congress directed the various land managing agencies at that time to place all records with state and local government. The sole remaining exception has been mining claim information, which has been properly viewed as a provisional property right within the split estate, subject to annual requirements which if not fulfilled return the grant of mineral ownership to the grantor. RS 2477 rights of way have no provisional ownership requirements and may be considered to be perpetual, as are fee simple property rights. If the federal government intends to enter the business of recording all ownerships in property, the traditional work of county government, it must first set up a legal framework delineating its legal responsibilities in this area. The current Vento Bill does not set up such an agency or give any constraint to the BLM as to its responsibilities for the maintenance of these property records, other than the requirement that they be filed and acknowledge or denied. This is an area best left to the states and counties.

c. Congressman Vento's Bill disregards federal law which specifically states that the federal government's agencies and agents will be bound by the laws both civil and criminal of the jurisdiction in which their property holdings occur.

The mere ownership of land by the federal government has not been considered to exempt it from following the laws of local governments with regards to highways. County and state governments can set the speed at which vehicles will be allowed to travel, the weight and safety requirements for movement on highway and the standards of highway maintenance. The federal government would enter a new area of authority under the proposed Vento legislation, with the right to define what a road is and to what standards it must be constructed to be considered a road, currently matters for state authority. The example of the 55 mph speed limit is instructive. In that case, the federal government wished to impose a standard for fuel and safety on state and county highways, but lacked the legal means of doing so. By applying the pressure of restriction of highway funds for those states which refused to impose the new limit, the federal government forced all states into compliance. This legislation goes beyond simple funding blackmail.

Under Vento's plan the state's right to regulate its highway system will be mute since the federal government will define the conditions of use. This may also effect other areas and set a precedence for federal actions on highways, such as, the safety, travel and weight requirements for the transportation of toxic, atomic and other federally generated wastes within a state's borders.

2. The proposed legislation is a direct assault on ownership of property and attempts to exchange the court's authority in the area of eminent domain with administrative rule. These rights of way were granted to the general public upon their initial construction and the federal government is only the servient estate owner. Under the Vento Bill, the owner of the servient estate, the federal government, would have the ability to set up a procedure for determining if adverse claimants to its property were legitimate. This traditional judicial right would be usurped, allowing one of the combatants in the legal proceeding to be the judge and jury in the matter of who owns what. This has been proposed in order to avoid having to fulfill standard eminent domain proceedings with their takings implications.

The federal government has ample recourse at present and doesn't need to break down our system of checks and balances simply to avoid a few court costs.

3. The major reason for this legislation and its strongest backers are those who advocate wilderness and environmentalism. The Wilderness Act of 1964 was quite specific in recognizing prior existing rights and insisting that roaded and inhabited areas be excluded from designated wilderness. In the RARE II process, private property, roads and whole former town sites were included as Wilderness Study Areas and in some instances as wilderness.

This clearly violated the law. In order to continue designating more wilderness and to post facto validate inappropriate designations, the agencies involved in the process redefined what a road was. Such an action by a federal agency is clearly beyond their authority and the Vento Bill is designed to ex post facto validate their illegal actions. If Congress wishes to include roaded areas in Wilderness or give Wilderness designations to private property it should revisit the original act. The Vento Bill, as an ex post facto imposition of road definitions, is clearly not Constitutionally valid.



The intent of Congress in preserving existing rights in the original Wilderness Act is not for the current Congress to decide, but is a matter for the courts. Representative Vento and his backers should either let the courts rule in this process or more clearly state their case for changing the Wilderness laws of the nation, not try to slink around in the dark of night to change the whole of American property law to preserve illegal actions."

I shall appreciate, in behave of those who participated on this Ad Hoc Committee, your genuine consideration with respect to the testimony herewith submitted.

H.R. 1603

APR 23 1993

## IN THE HOUSE OF REPRESENTATIVES

April 1, 1993

Mr. Vento introduced the following bill; which was referred jointly to the Committees on Natural Resources and Rules

---

A BILL

To authorize appropriations for programs, functions, and activities of the Bureau of Land Management for fiscal years 1994 through 1997; to improve the management of the public lands; and for other purposes.

1 Be it enacted by the Senate and House of Representatives of  
2 the United States of America in Congress assembled,

## 3 SECTION 1. AUTHORIZATION

4 There are hereby authorized to be appropriated such sums as  
5 may be necessary for programs, functions, and activities of the  
6 Bureau of Land Management, Department of the Interior (including  
7 amounts necessary for increases in salary, pay, retirements, and  
8 other employee

1 (b) The table of contents of the Act is amended by  
2 inserting after the item relating to section 707 the following  
3 new item:

"Sec. 708. Judicial review."

4 SEC. 14. CLAIMED RIGHTS-OF-WAY

5 The Act is hereby amended by adding at the end of title III  
6 the following new sections 319 and 320:

7 "SEC. 319. RECORDATION OF CLAIMED RIGHTS-OF-WAY.

8 "(a) FILING REQUIREMENTS.--(1) Any party claiming to be a  
9 holder of a right-of-way across public or other Federal lands  
10 for the construction of a highway pursuant to a grant made  
11 by Revised Statutes section 2477 (43 U.S.C. 932) that became  
12 operative before repeal of such section on October 21, 1976  
13 shall, on or before January 1, ~~1994~~, 1997 file for record in  
14 the office or offices of the Bureau of Land Management  
15 responsible for management of public lands within the State or  
16 States wherein such claimed right-of-way is located either a  
17 notice of intent to hold and maintain the right-of-way or a  
18 notice of abandonment of such party's claim to be the holder  
19 of such right-of-way. A notice of intent to hold and maintain  
20 such a right-of-way shall be accompanied by information con-  
21 cerning the actual construction, maintenance, and public use  
22 on which such party bases its claim to have established  
23 such a right-of-way, and by such other information regarding  
24 the uses, location, and extent of such claimed right-of-way

1 as the Secretary of the Interior may require. The Secretary  
2 may allow information already in the possession of the Bureau  
3 of Land Management to be included by reference to the documents  
4 in which such information is recorded.

5 ~~"(2) A party filing~~ Upon receiving a notice pursuant to  
6 paragraph (1) the BLM shall also ~~simultaneously~~ file within  
7 30 days a copy thereof in the appropriate office of any other  
8 agency responsible for management of any Federal lands traversed  
9 by the claimed right-of-way, and shall give public notice of the  
10 party's intention to hold and maintain or to abandon the claimed  
11 right-of-way by publication of information concerning such  
12 intention in one or more newspapers of general circulation in  
13 the areas where affected lands are located.

14 "(a) (b) EFFECT. --(1) The failure of any party subject to  
15 the requirements of subsection (a)(1) to file the notices ~~or to~~  
16 ~~publish the information required to be filed and published by~~  
17 ~~such subsection within the time specified by such subsection~~  
18 shall be conclusively deemed to constitute an abandonment and  
19 relinquishment of a right-of-way with respect to which such  
20 filing ~~and publication is required by such subsection.~~

21 "(2) Recordation Filing pursuant to this section shall not,  
22 of itself, render valid any claim which would not otherwise  
23 be valid under applicable law or provide a basis for changing



1 the scope, alignment, or character or extent of use of any  
2 claimed right-of-way; and nothing in this section shall be  
3 construed as waiving, altering, or otherwise affecting any  
4 terms or conditions applicable to any right-of-way under  
5 this Act or any other applicable law.

6 "(c) INVESTIGATIONS--(1) ~~Upon~~ Within 45 days of receipt of  
7 a notice filed pursuant to subsection (a) 1 that a party intends  
8 to hold and maintain a claimed right-of-way involving any lands  
9 specified in paragraph (2) of this subsection, the Secretary  
10 of the Interior, acting through an appropriate officer of the  
11 Bureau of Land Management or (if any portion of a claimed  
12 right-of-way covered by this subsection is located within a  
13 unit of the National Park System) of the National Park  
14 Service, ~~shall~~ may conduct and shall be completed within 30  
15 days following an investigation to determine the validity of  
16 each claimed right-of-way. Such investigation shall not change  
17 current or proposed use. The Secretary ~~shall~~ may provide an  
18 opportunity for the public to contest or request an  
19 investigation a period of 30 days from publish date of the  
20 validity of any other claimed right-of-way.

21 "(2)(A) The Secretary ~~shall~~ may investigate the validity  
22 of each claimed right-of-way any portion of which involves--

23 "(i) any lands within the National Park System,  
24 the National Wild and Scenic River System, or the  
25 the National Wilderness Preservation System; or

1           "(ii) any lands being managed so as to preserve  
2           their suitability for designation as wilderness, pursuant  
3           to section 603 of this Act or any other provision of law  
4           or regulation; or

5           "(iii) any area of critical environmental concern;  
6           or

7           "(iv) any other lands whose use for highway  
8           purposes would be inconsistent with the land-use  
9           plans for those lands.

10          "(B) The Secretary ~~shall~~ may also investigate any claimed  
11 right-of-way not involving lands specified in subparagraph  
12 (A) but with respect to which a contest or request challenge  
13 is filed that states grounds which, if proved or confirmed,  
14 would constitute reason to doubt the validity of such claimed  
15 right-of-way or any portion thereof.

16          "(3) If any portion of such claimed right-of-way is on  
17 Federal lands managed by an agency other than the Bureau  
18 of Land Management or the National Park Service, the  
19 investigating officer ~~shall~~ may request the comments of  
20 such agency with respect to the validity of such right-  
21 of-way.

22          "(4) Appropriate notice to the public, including the  
23 owners of any non-Federal lands affected by the claimed  
24 right-of-way, shall be provided with respect to initiation  
25 of each investigation carried out pursuant to this para-

1 graph, and the investigating officer ~~shall~~ may provide an  
2 opportunity for the public to submit comments concerning the  
3 subject of the investigation.

4 "(5) If information or comments submitted to the in-  
5 vestigating officer demonstrate that there is a dispute as  
6 to any relevant facts with respect to the validity of a right-  
7 of-way subject to an investigation under this paragraph,  
8 the parties to such dispute shall be afforded an adjudica-  
9 tory hearing on the record with respect to such disputed  
10 issues of fact. Any such adjudicatory hearing shall be be-  
11 fore a qualified administrative law judge whose findings  
12 shall govern disposition of such issues of fact in any deter-  
13 mination concerning the validity of a claimed right-of-way,  
14 subject to administrative and judicial review under appli-  
15 cable provisions of law.

16 "(6) If after an investigation pursuant to this para-  
17 graph, the investigating officer finds either that a claimed  
18 right-of-way or portion thereof is valid or invalid ~~that there~~  
19 ~~is reason to doubt the validity of such claimed right-of-way or~~  
20 ~~portion thereof~~, notice of such finding and the reasons there-  
21 fore shall be provided to the party claiming the right-of-  
22 way and

23 to all other affected parties, including the public, within but  
24 no later than 90 days of the filing of the notice of intent.

25 "(7) For purposes of this section, if any portion of  
26 a claimed right-of-way includes lands managed pursuant

1 to section 603 of this Act, that fact shall not in itself  
2 constitute ~~a reason to doubt~~ the invalidity of such portion of  
3 such right-of-way.

4 "(d) APPEALS. -- ~~(1) Any claimed right of way or portion~~  
5 ~~thereof with respect to which it is found, pursuant to~~  
6 ~~subsection (c), that there is reason to doubt the validity,~~  
7 ~~shall not be deemed to be invalid unless, within 30 days after~~  
8 ~~such finding the party claiming the right of way has filed~~  
9 ~~with the Secretary of the Interior an appeal of such find-~~  
10 ~~ing, and the Secretary thereafter determines the right of-~~  
11 ~~way to be valid. (2) Any party other than the party claiming~~  
12 ~~the right of way, may intervene in any appeal filed under~~  
13 ~~this paragraph in support of the finding of invalidity by~~  
14 ~~filing with the Secretary a notice of such intervention,~~  
15 ~~within the period allowed for filing of the appeal.~~

16 "(1) ~~(2)~~ Any finding by the investigating officer with re-  
17 gard to the validity or invalidity of a claimed right-of-way  
18 or portion thereof valid shall become final unless within  
19 30 days after such finding a notice of appeal of such finding  
20 is filed with the Secretary of the Interior.

21 "(2) Any party other than the party claiming the right-  
22 of-way, may intervene in any appeal filed under this paragraph  
23 in support of the finding of invalidity by filing with the  
24 Secretary a notice of such intervention. within the period  
25 allowed for filing of the appeal.

26 "(3) ~~(2)~~ Any decision by the Secretary with regard to an

1 appeal under this subsection shall be made after the party  
2 claiming or contesting a right-of-way has been provided with  
3 the evidence upon which the investigating officer's finding  
4 regarding its validity or invalidity was based and has been  
5 given an opportunity to respond, including an adjudicatory  
6 hearing on the record with respect to any disputed issues  
7 of fact.

8 "(4)(A) Pending a final determination of validity with  
9 respect to a claimed right-of-way that is subject to an ap-  
10 peal under this subsection, the Federal land covered by  
11 such claimed right-of-way shall be managed in accordance with  
12 applicable law (including this Act) and management plans  
13 as if such right-of-way did ~~not exist, except that~~ such  
14 lands may continue to be used for lawful transportation,  
15 access, and related purposes of the same nature, and to the  
16 ~~same extent as was properly permitted by the Secretary on~~  
17 ~~the date of enactment of this section.~~ Any such continued  
18 uses shall be subject to appropriate regulations to protect  
19 the resources and values of the affected lands.

20 "(B) Upon a final administrative determination of invalidity  
21 with respect to a claimed right-of-way subject to an appeal  
22 under paragraph (3), Federal lands covered by such claimed  
23 right-of-way shall be managed in accordance with applica-  
24 ble law and management plans.

25 "(C) A determination by an investigating officer as



1 to the validity or invalidity of a claimed right-of-way  
2 may be appealed to the Secretary by any person, provided such  
3 appeal is made no later than 30 days after the determination  
4 of the investigating officer. Any person filing such an  
5 appeal shall be afforded an adjudicatory hearing on the  
6 record with regard to any disputed issue of fact. Any deci-  
7 sion of the Secretary regarding such an appeal shall be  
8 subject to judicial review.

9 "(5) Any decision by the Secretary pursuant to this  
10 subsection shall be subject to judicial review under appli-  
11 cable provisions of law, but nothing in this subsection shall  
12 be construed as affording any right to seek or participate  
13 in any judicial proceeding by any party not otherwise enti-  
14 tled to seek or participate in such proceeding.

15 "(e) CHANGE IN USE.--Any change in the scope,  
16 alignment, or character of use of a valid right-of-way es-  
17 tablished pursuant to Revised Statutes section 2477 shall  
18 be subject to terms and conditions required by section 505  
19 of this Act or other applicable law.

20 : (f) SAVINGS CLAUSE--Nothing in this section shall be  
21 construed as increasing or diminishing the requirements of  
22 any applicable law with respect to establishment, construction,  
23 or maintenance of a highway for purposes of obtaining a valid  
24 right-of-way pursuant to Revised Statutes section 2477 prior  
25 to its repeal.

## IN THE HOUSE OF REPRESENTATIVES

## HOUSE BILL NO. 388

## BY STATE AFFAIRS COMMITTEE

## AN ACT

RELATING TO HIGHWAYS AND FEDERAL LAND RIGHTS OF WAY; EXPRESSING LEGISLATIVE INTENT; AMENDING SECTION 40-107, IDAHO CODE, TO DEFINE FEDERAL LAND RIGHTS OF WAY; AMENDING CHAPTER 2, TITLE 40, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 40-204A, IDAHO CODE, TO PROVIDE FOR DOCUMENTATION, ABANDONMENT, USE, VALIDATION AND ACKNOWLEDGEMENT OF FEDERAL LAND RIGHTS OF WAY; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. STATEMENT OF LEGISLATIVE INTENT. The State of Idaho recognizes that existing federal land rights of way are extremely important to all of Idaho's citizens. Two-thirds of Idaho's land is under control of the federal government and access to such federal lands is integral to public use. The Idaho State Legislature recognizes the necessity for establishing a procedure for identifying and confirming the existence of previously established federal rights of way, to protect those rights previously granted to and vested in, the citizens of Idaho.

SECTION 2. That Section 40-107, Idaho Code, be, and the same is hereby amended to read as follows:

## 40-107. DEFINITIONS -- F.

(1) "Facilities" mean tracks, pipes, mains, conduits, cables, wires, towers, poles, equipment and appliances.

(2) "Family" means two (2) or more persons living together in the same dwelling unit who are related to each other by blood, marriage, adoption or legal guardianship.

(3) "Farm operation" means any activity conducted primarily for the production of agricultural products or commodities, including timber, for sale and home use, and producing agricultural products or commodities in sufficient quantity to contribute materially to the operator's support.

(4) "Feeder highway" means any highway which, in the opinion of the transportation board, is needed to create or facilitate access to a turnpike project upon which a toll is charged for transit.

(5) "Federal land rights of way" mean rights of way on federal land within the context of Revised Statute 2477, codified as 43 United States Code 932, and other federal access grants and shall be considered to be any road, trail, access or way upon which construction has been carried out to the standard in which public rights of way were built within historic context. These rights of way may include, but not be limited to, horse paths, cattle trails, irrigation canals, waterways, ditches, pipelines or other means of water transmission and their attendant access for maintenance, wagon roads, jeep trails, logging roads, homestead roads, mine to market roads and all other ways.

SECTION 3. That Chapter 2, Title 40, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 40-204A, Idaho Code, and to read as follows:

40-204A. FEDERAL LAND RIGHTS OF WAY. (1) The state recognizes that the act of construction and first use constitute the acceptance of the grant given to the public for federal land rights of way, and that once acceptance of the grant has been established, the grant shall be for the perpetual term granted by the congress of the United States.

(2) The only method for the abandonment of these rights of way shall be that of eminent domain proceedings in which the taking of the public's right to access shall be justly compensated. Neither the mere passage of time nor the frequency of use shall be considered a justification for considering these rights of way to have been abandoned.

(3) All of the said rights of way shall be shown by some form of documentation to have existed prior to the withdrawal of the federal grant in 1976 or to predate the removal of land through which they transit from the public domain for other public purposes. Documentation shall take the form of at least a map, and an affidavit. Surveys, books and other historic information may also be included.

(4) These rights of way shall not require maintenance for the passage of vehicular traffic, nor shall any liability be incurred for injury or damage through a failure to maintain the access or to maintain any highway sign. These rights of way shall be traveled at the risk of the user and may be maintained by the public through usage by the public.

(5) Any member of the public, the state of Idaho and any of its political subdivisions, and any agency of the federal government may choose to seek validation of its rights under law to use granted rights of way either through a process set forth by the state of Idaho, through processes set forth by any federal agency or by proclamation of user rights granted under the provisions of the original act, Revised Statute 2477.

These rights of way shall not be required to possess centerline surveys typical of publicly maintained roads, but shall be surveyed prior to being accepted into the maintained public highway system.

Neither the granting of the original right of way nor any provision in this or any other state act shall be construed as a relinquishment of either federal ownership or management of the surface estate of the property over which the right of way passes.

(6) Persons seeking acknowledgement of federal land rights of way shall file with the county recorder the request for acknowledgement and for any supporting documentation. The county recorder shall place the acknowledgement on the official county road system map.

SECTION 4. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

STATEMENT OF PURPOSE

RS 02711

Defines "federal lands rights-of-way" within the context of Revised Statute 2477, codified as 43 United States Code 932, and other access grants of interest to Idaho. The State of Idaho recognizes perpetual term of grant, method for abandonment, form of documentation, requirement for maintenance and liability, no relinquishment of ownership. Provides method for county clerks to record assertions.

FISCAL NOTE

No fiscal impact to General Fund.

LEGISLATURE OF THE STATE OF IDAHO  
Fifty-second Legislature

LEGISLATURE OF THE STATE OF IDAHO  
First Regular Session - 1993

IN THE HOUSE OF REPRESENTATIVES

HOUSE JOINT MEMORIAL NO. 6

BY STATE AFFAIRS COMMITTEE

A JOINT MEMORIAL

TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES IN CONGRESS ASSEMBLED, AND TO THE CONGRESSIONAL DELEGATION REPRESENTING THE STATE OF IDAHO IN THE CONGRESS OF THE UNITED STATES.

We, your Memorialists, the House of Representatives and the Senate of the State of Idaho assembled in the First Regular Session of the Fifty-second Idaho Legislature, do hereby respectfully represent that:

WHEREAS, western United States territories, before and after joining the Union of States, presented unique transportation and settlement challenges with little or no governmental oversight; and

WHEREAS, the 1800's saw this western settlement occur with sometimes unorganized surges of immigrants who had no governmental authority to guide them in the establishment of roads, schools, village boundaries, township lines and related infrastructure; and

WHEREAS, economic opportunities attracted thousands of settlers who traversed the lands in search of gold and other minerals, furs and homesteads and who caused to be constructed roads, paths and trails for the common use; and

WHEREAS, Congress in 1866 amended the mining law in order to recognize legal rights-of-way for those roads, paths and trails by adding Section 2477, commonly referred to as Revised Statute 2477; and

WHEREAS, many of the surface trails for horses, dog teams and man became permanent transportation links between settlements; and

WHEREAS, the phases of exploration, settlement and transportation did occur concurrently, in intervening years, and in current times in Idaho and other western states where the Revised Statute 2477 grants are still applicable; and

WHEREAS, there is a growing threat to surface access to private "inholding" properties in some conservation units, certain national parks and wildlife designations, and in other federal land withdrawals; and

WHEREAS, there are increased efforts to pressure Congress to extinguish the Revised Statute 2477 authorization and grants.

NOW, THEREFORE, BE IT RESOLVED by the members of the First Regular Session of the Fifty-second Idaho Legislature, the House of Representatives and the Senate concurring therein, that we urge Congress to recognize its legal and historic commitment, under Revised Statute 2477, to rights-of-way access to unreserved, or formerly unreserved, public lands.

BE IT FURTHER RESOLVED that the Chief Clerk of the House of Representatives be, and she is hereby authorized and directed to forward a copy of this Memorial to the President of the Senate and the Speaker of the House of Representatives of Congress, and the congressional delegation representing the State of Idaho in the Congress of the United States.



TESTIMONY BEFORE THE HOUSE OF REPRESENTATIVES  
SUB COMMITTEE ON  
NATIONAL PARKS, FORESTS AND PUBLIC LANDS  
ADDENDUM TO TESTIMONY  
BY  
PETE T. CENARRUSA  
SECRETARY OF STATE  
STATE CAPITOL  
BOISE, IDAHO

MAY 25, 1993

This is additional testimony regarding H.R. 1603 as submitted by Idaho's Organization termed "SOAR" Save our Access Rights of Way.

"The Time Frame as listed on page 11 lines 13 & 14 is too short and unrealistic in light of the amount of work that the bill requires. To do the work that is required would probably take 10 plus years. Further, there should be provisions in the bill which would allow the states the expenditures to finance such a road study.

The publication requirement on page 12 line 12 should not be required. Submission of the claim to the proper office should be sufficient for the BLM to initiate an investigation.

In addition there is no need to have the claimant submit all the information indicated in as much as the BLM will required to make an official investigation and would have to gather the same information all over again, thus duplicating the research work.

The documentation required on page 11 line 21 to page 12 line 14 is impossible to meet in the allotted time frame. In addition the publication costs are prohibitive to the private individual or non-profit organization. Even if it was possible to meet the costs there is no assurance that the information will be accepted by those who have the authority for review, in which case all of the expenditure would be lost.

Failure to meet the required dates and submit the required information as stated on page 12 lines 15 - 22 constitutes abandonment. Under the specified time frame this is unacceptable. This time period should be extended several years as it is impossible to do what the bill requires in the amount of time specified.

Recordation, page 12 line 23, should be proof of validity until such time as it is proved that the claim is not valid.

Under appeals, page 16 lines 16-20, the investigating officer has too much authority. If in the investigation this person has a bias against the claim or the claimant he can slant a report so as to make the claim invalid and thus force the claimant to make a costly appeal. Prior to a decision the claim should be heard by no less than an administrative judge before the claimant has to resort to an appeal. Additionally, we feel a judge that is elected by the people to be more appropriate in the matter of public road ways. We think this is provided for under disputes (see page 15 line 11) but not to the investigating officers determination."

Mr. VENTO. Ms. Hjelle.

### STATEMENT OF BARBARA HJELLE

Ms. HJELLE. Thank you. I appreciate this opportunity to be here today to testify on behalf of the Utah Association of Counties.

My experience with R.S. 2477, which is the focus of my statements today, started in 1985 and has continued through involvement in the entire Burr Trail litigation, which I am sure many of you have heard of involving a road in Garfield County in Utah.

In the course of my experiences in dealing with Garfield County and other counties in Southern Utah, the importance of these roads to rural Utah has become apparent to me.

These roads provide the infrastructure of transportation throughout the rural West and throughout rural Utah. These are the roads by which people are getting to and from work, to and from school, by which health, police, fire protection services are provided and by which all other general forms of transportation are made similar to what everyone here does everyday, driving the beltway or driving to and fro.

The fact that they may not all be paved or substantial does not render them less significant or less important to the economic and social activities of rural counties. On the contrary, they are all the more important.

I have brought with me today, and would ask that each of you take a copy of, a series of photographs that have been taken of R.S. 2477 roads in Utah. And I don't think these roads are necessarily representative of all the kinds of roads that are considered or would be impacted by this legislation. But they certainly would give you an idea of the importance of these roads.

These are roads that go to airports, that access national parks, State parks, and other important areas in the State. There are certainly less developed roads that are also important. But the word that you are getting that rural counties are out to defeat wilderness, are out to stop Federal resource protection through claiming unnecessary rights, through claiming marginal roads, has not been my experience. This has not been my observation.

Furthermore, my observation has been that the counties and other local governmental agencies that are managing these roads are acting responsibly. And if you are not getting that information, I am here to tell you that that is what I see, that counties and governmental entities that are dealing with BLM and the National Park Service have bent over backwards to accommodate the Federal agencies that are designed to protect Federal resources and the natural resources on the public lands.

So, I really have to disagree with anyone who tells you that counties are out to try to defeat wilderness, to try to make inroads into Federal lands where these roads are not already in existence and not important to the counties.

They don't have the money or the resources to do it. They are not going to get ability to do it. So they want to protect their transportation infrastructure. They want to protect roads that have already legitimately been accepted pursuant to this grant from Congress.

I think it is important to the legislation. The problems that I perceive with the legislation have to do with the extended procedural requirements that are imposed by it. And the problem with that has to do with the time and the expense that will be imposed not only on claimants, but I believe also on the Federal agencies that are being asked to carry out this legislation.

You have a two-tiered adjudicatory process, which is unheard of in my experience with road rights-of-way. Currently, appeals to the BLM are taking up to 3 years without an adjudicatory hearing. So if you impose a two-tiered process with an adjudicatory process, it is difficult for me to conceive of how long this might take or what the burdens might be on the Federal Government.

Since local governments who are claiming these roads are going to have to make these claims very carefully because of this right of review, the volumes of documentation that would be presented to the Federal agencies might also be unmanageable.

I think that this legislation is going to have impacts beyond Utah. The concerns that I have noted in reading through it is that rights-of-way that are challenged will be deemed invalid until those challenges are over. And if, in fact, they do take many years, there doesn't seem to be anything in the legislation to allow for maintenance of these roads for safety purposes.

And I think anybody who really digs in and looks at what is happening in places like Utah will see that is what these people are trying to do. They are trying to take the legitimate uses of the road and ensure that those uses are allowed to go forward in a safe manner. These uses are already being made. They are not trying to increase those uses. They are trying to assure that the uses that are legitimate are safe.

Also, the roads cannot be changed in any way in scope, alignment, or character of use. And I have concerns about what that might mean in terms of limiting or taking away the scope of the right already granted. These are property rights which were granted directly by Congress to public-local governments and have now been accepted. They have been managed responsibly for decades.

I think the real change that is going on here is an interface between an interest in preservation of public lands and an interest in the economic viability of rural communities. And instead of imposing massive legislation, BLM should be encouraged to work with local governments to come up with a reasonable balance between those interests that doesn't stifle the ability of western communities to survive.

I thank you very much for this opportunity to be here.

Mr. VENTO. Thank you.

[Prepared statement of Ms. Hjelle follows:]



**COMMENTS ON PROPOSED LEGISLATION ON R.S. 2477**  
**(Sec. 14 of H.R. 1603)**

**Submitted on behalf of the Utah Association of Counties  
by Barbara Hjelle**

Rights of way granted by section 2477 of the Revised Statutes of the United States (R.S. 2477) across rural Utah constitute the major transportation network, ranging from paved highways linking major communities to rural highways linking other points of activity.<sup>1</sup> Because much of the land in these counties is federally owned, access across federal lands is essential to transportation. All of these roads have been used and relied upon by citizens of these areas, and others, for legitimate purposes for decades. The protection of these rights-of-way, which form the transportation infrastructure of rural Utah, is essential to Utah's economic and social well-being. Counties, and other right-of-way claimants, will undertake every effort to protect these rights.

Section 14 of H.R. 1603, specifically proposed Section 319 to be added to Title III, (hereinafter referred to as "Section 319"), through its extensive procedural requirements, short deadline, expansive offering of standing to intervene and other provisions, would, at a minimum, place improper limitations on the activities of the state and local governments who manage these rights-of-way for the safety of the traveling public and, at its most serious, would cause the loss of many important rights-of-way.

Any new Congressional action should respect the legitimate interests in property rights which have already been granted to the counties, and state and other local governments, by Congress. Because R.S. 2477 rights-of-way have been and will continue to be essential to the infrastructure of rural Utah, any action by the federal government must be based on a fair and complete understanding of the history, law and economic importance of these roads.

That history shows that counties, who are the main holders of these rights-of-way, have been responsible and conscientious in their management of these rights-of-way. Counties have worked very hard to comply with all requirements of the federal land managers, even when those requirements have imposed onerous and arguably improper burdens on the right-of-way holder. Local governmental entities do not propose to upgrade roads where the current traffic conditions do not justify those improvements for safety purposes. Unless there is a reasonable justification for allocation of limited financial resources to construction, impacts from construction will not occur.

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<sup>1</sup>We have provided, for the record, some photographs of R.S. 2477 highways in Utah, to show the nature of some of the roads which would be affected by the proposed legislation.



Special interest groups tell a different story, portraying the counties as irresponsible managers of these rights-of-way who are running roughshod over the public lands without regard to federal and environmental interests or, for an even more extreme story, who are using the rights granted under R.S. 2477 in an attempt to thwart federal protections of natural and other resources. That picture is not supported by a fair and unbiased review of the facts or the law.

You may have heard about the "Burr Trail" road in Garfield County in southern Utah. Special interest groups have used this road as a rallying cry, but the story they tell does not give a fair picture of what has really happened. Garfield County has been the holder of that right-of-way for decades. The road has been maintained, and upgraded, continuously as technology and funds became available, to accommodate the growing traffic in the area. Particularly after the creation of Lake Powell by the construction of Glen Canyon Dam, which led to substantial tourism through the area, the road became more important to the transportation infrastructure of the county. The county attempted to work with the Bureau of Land Management (BLM) and the National Park Service on a cooperative effort to upgrade the road, beginning in the early 1980's. However, because the road provides access to scenic backcountry areas, special interest groups fought every effort to improve the road. These people did not attempt to work through the local governmental processes nor did they work to find a constructive solution through compromise.

Ultimately, when cooperative efforts with the federal government were stymied, Garfield County moved ahead, on its own, consistent with decades of past practice, to bring this road to the minimum safety standards. The design for the new improvements adhered to a fundamental commitment to minimize environmental impacts wherever possible without compromising safety of the road. Throughout this effort, the county kept in close communication with the BLM, and at every turn, the county accommodated requests BLM made to meet its land management goals.

Nevertheless, when the contract was let to improve 28 miles of the road from the town of Boulder to the boundary of Capitol Reef National Park, both the county and BLM were sued by special interest groups. That litigation commenced in 1987 and, in one form or another, continues to this day. In the process, the courts have vindicated Garfield County's careful planning and design efforts and have affirmed and clarified the rights offered by R.S. 2477 and protected by the Federal Land Policy and Management Act (FLPMA).

Throughout the litigation, and thereafter, in all of its activities on the Burr Trail road, Garfield County has acted responsibly. I believe the County would have been willing, at any time, to compromise to try to meet reasonable demands of the

special interest groups focused on environmental protection. However, those groups wanted nothing less than to stop the county from exercising its rights, so no reasonable compromise was available. Now, after the development of a substantial record and a careful review of the facts and the law given by the federal judges who heard this case have supported the reasonableness of the county's efforts, while also providing protection of federal interests, these groups are still attempting to accomplish their goals to eliminate R.S. 2477 rights-of-way by convincing members of this body that these 2477 rights-of-way are damaging to federal and environmental interests, without regard to the other significant contributions these roads make to the well-being of society in the West. But if the true story of the management and importance of these roads were understood, no reasonable person would choose to hamper local governments in the way this legislation would do.

Another factual example is offered by the Henry Mountain Resource Area in Utah, which provides insight into the real situation in Utah. BLM has offered the following facts<sup>2</sup>:

1. "The Henry Mountain Resource Area encompasses 2.6 million acres of private, State and BLM-administered lands within Garfield and Wayne Counties in Southeastern Utah." (USDI Draft Report to Congress, R.S. 2477, March 1993, p. 34.)
2. There are approximately 320 R.S. 2477 rights-of-way in this area covering about 1,450 miles.
3. Of these 1,450 miles of road, only 16 miles are contained within Wilderness Study Areas. However, a "citizen group's" wilderness proposal would contain approximately 200 miles of R.S. 2477 rights-of-way.

That case study tells us that out of the thousands of acres in wilderness study areas in the Henry Mountain Resource Area, only 16 miles of R.S. 2477 roads could be found. No significant impact to wilderness designation is offered by R.S. 2477 rights in this area. Obviously, the counties did not seek to assert road rights for the purpose of defeating federal interests in wilderness. Furthermore, the citizen group's proposal for wilderness contains a significant number of established roads and, therefore, does not truly qualify under the standards set by Congress. Obviously, the citizen groups would be happy to see R.S. 2477 rights-of-way defeated by federal wilderness designations.

The claims raised by special interest groups that R.S. 2477 rights-of-way are being used to defeat federal laws designed to protect natural resources or are otherwise being used by their

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<sup>2</sup>The counties do not agree with many of the statements made in this draft document regarding county actions, Utah law and the history of and reasons for road development in this area. However, we assume that the numbers cited in the draft report are accurate.

holders to create controversy in the management of federal public lands are unsupported by the facts. We submit that, in every case, if a fair assessment of the facts is undertaken, special interest groups will be shown to have mischaracterized the history to create an illusion of irresponsible local governments. As the facts cited above show, controversy has arisen because special interest groups desire to stop a continuation of reasonable management activities on these rights-of-way for the safety of the traveling public which is already using the roads, not because of some new county efforts in response to federal laws designed to protect the natural resources on public lands. These groups have created controversy by attempting to create and use new federal policies to restrict or limit the reasonable exercise of the prior federal grant under R.S. 2477.

More recently, as the threats to these rights-of-way are becoming more apparent, counties have begun to act more aggressively to protect these rights. These actions are a response to a threat to use new federal laws or regulations to defeat existing rights, and to a change in BLM's treatment of local governments and their plans, rather than initiation by counties of a threat to federal interests.

The counties of Utah have worked hard to maintain and improve their R.S. 2477 rights-of-way in accordance with well-founded engineering practices so as to have minimal impacts on the surrounding environment and have cooperated fully with the reasonable (and even unreasonable) requests of the BLM, when those requests have been properly communicated. The counties have no objection to continuing their practice of managing their roads so as to minimize unnecessary and undue impacts on federal lands. But the counties strongly object to any attempt to take away their rights by imposing impossible burdens designed to make the protection of those rights infeasible.

In the interests of the economic and social well-being of western areas containing substantial amounts of federal public lands, Congress, if it does anything, should attempt to strike a reasonable balance which does not unduly burden right-of-way holders in carrying out their duties to maintain safe roads, while also providing appropriate protection to natural resources. There are ways to do this that would not require the unwieldy legislation contained in Section 319.

If Congress wants to make the western public lands an enclave for backpackers and mountain bikers, closed off to normal travel from one community to another, closed off to any significant economic activity and bereft of living communities, take away the R.S. 2477 rights-of-way which form the framework for transportation in the rural West. But before you do that, consider the value of rural communities and local governments and what they offer to our society. The significance of R.S. 2477 to the West should not be

ignored. Regulation of public lands which are traversed by R.S. 2477 rights-of-way must respect the historical conditions and the economic and social needs of the western United States.

The counties strongly oppose the legislation currently before you as it pertains to R.S. 2477 rights-of-way. Section 319 would cut back on these rights by adding onerous requirements which may be difficult, if not impossible, to meet. This legislation would place an impossible burden on the governments who manage these long-standing rights-of-way. We believe that this legislation would also place an impossible burden on the federal government and, in the process, on the taxpayer who must fund the substantial administrative process which Section 319 would create.

In the debates leading up to the passage of FLPMA, Congress gave careful consideration to the importance of prior existing rights, including R.S. 2477. The final statute provided a balance that honors these rights and their contribution to the American West. FLPMA provides that local government interests are to be given consideration in the management of the public lands. Section 319 would begin a new trend which fails to reflect any meaningful concern for local interests or the impacts of its procedural burdens on local governments, not to mention the federal land management agencies.

Section 319 imposes a series of procedural hurdles, none of which offer any substantive benefit, and all of which offer a quagmire for delay and litigation. The only parties to benefit from such legislation are those who desire to use procedural hurdles to tie up projects, regardless of their merit, in the hopes that the delay and expense involved will ultimately defeat the project. Counties have already foregone or delayed safety improvements because of the current interference by special interest groups. If this new legislation takes effect, there will be no road improvements on R.S. 2477 rights-of-way, regardless of need, for a long time to come.

The job imposed by this legislation is monumental. Because the R.S. 2477 grant was open-ended and, based upon explicit federal regulation, required no documentation, the roads have been developed and used for decades without attention to record-keeping. It is not always clear whether a highway has been covered by a written permit or whether it was accepted pursuant to the R.S. 2477 grant. Some highways may have written permits issued for portions and have other portions authorized by R.S. 2477. A county, or other claimant, must either investigate each highway within its jurisdiction to determine whether a claim should be filed pursuant to Section 319 or must file claims covering any highway which might possibly be covered by this legislation. In fact, the legislation provides no exemption for roads which have already been recognized by BLM or by the courts. In order to preserve its rights, a



claimant should file as required by Section 319, regardless of prior acknowledgement.

Record keeping by both the federal and local governments has not always been well-organized. Requests for such records from the federal government have, at times, yielded the response that the records have been lost. Where those records have been, or should have been, maintained by the federal government, federal officials will be swamped with requests for access to files necessary to document permitted rights. A search for records to determine whether permits have been issued for each highway would prove overwhelming.

A decision to forego this monumental record search and file claims for all potential R.S. 2477 highways would also create an overwhelming task both for the claimant and for the federal government. A county would have to undertake a compilation of records and other information to establish the documentation of "actual construction, maintenance and public use" required by Section 319, all within the few months between passage of the bill and January 1, 1994! This requirement would be impossible to fulfill, even if the records were generally available and well-organized for this purpose, since some counties have hundreds of rights-of-way which they may legitimately claim and which are essential to the economic and social interests of residents and other users of these roads. Section 319 clearly imposes an unreasonably short time frame to claim R.S. 2477 highways.

Given the opportunities offered for administrative review and adjudication, with opportunities for any member of the public to intervene to contest any claim, careful documentation of each claim will be essential to ensure success on review. A claimant must, of necessity, submit every relevant item evidencing its claim. The space necessary for this documentation could, in and of itself, require special treatment.

The investigation required of the federal agencies would be overwhelming, if performed in good faith, for the same reasons set forth above. Since public involvement is welcomed, without reservation as to interest or standing, additional chaos will be created by uninformed or unprincipled intervention into this process. In the alternative, the process would become an exercise in bureaucratic paper shuffling with no meaningful benefit. Presumably, additional allocations of tax dollars will be necessary to provide the necessary federal personnel to handle the requirements of this legislation. Otherwise, it would take years to complete the process required, leaving R.S. 2477 rights-of-way in limbo, without maintenance or improvement during this time period.

The investigation process is only the first step, however, of a bureaucratic marathon created by this bill. After the initial



investigation, there might also be an "adjudicatory hearing on the record," offering rights of intervention without the traditional limitations offered by carefully considered federal statutes such as the Administrative Procedure Act. (See, Section 319(c)(5) (emphasis added).) This offers a procedure unprecedented in administrative treatment of rights-of-way. The federal government is also required to give notice to the public of its findings (Section 319(c)(6)). The claimants are also required to give notice by publication of their claims (Section 319(a)(2)). The cost of publication or other notice required for these numerous highways would be burdensome on both the claimants and the federal agencies.

The procedural intricacies do not stop after the investigation. After the investigation (and possible adjudicatory hearing) is completed, another appeal process is provided, once again open to the public at large, which may involve yet another adjudicatory hearing on the record (Section 319(d)). Anybody can obtain an adjudicatory hearing if that person opposes a decision recognizing the validity of the right-of-way (Section 319(d)(4)(C)).

Finally, after this multi-tiered administrative process, there is a right to judicial review (Section 319(d)(5)). The statute does not explicitly tell us how it intends to apply to the long-standing policy of the Department of the Interior that the courts, and only the courts, can adjudicate R.S. 2477 rights-of-way. There is no apparent concern for fundamental constitutional and legal principles regarding limitations on the power of Congress to defeat perfected rights, nor considerations of comity between two sovereign governments. One must question the wisdom of attempting to abolish the fundamental rule that leaves issues of title in the province of the courts. One must further question the fairness of putting the administrative agency which is acting on behalf of the federal party, in what amounts to a title dispute, in control of the decision.

In spite of this unwieldy and inherently unfair process, the courts will still be, as they must, the final arbiters of these decisions. This legislation creates a vast, inefficient bureaucratic quagmire, designed to create otherwise unnecessary litigation.

Some might argue that current litigation reflects an unstable situation which should be corrected by Congress. However, litigation is the means by which our society sorts out its problems, and whatever its difficulties, the history of litigation on R.S. 2477 reflects reasonable progress in that direction. This legislation would diminish the benefits of all these prior efforts and derail the progress towards substantive resolution of those issues which remain to be resolved.

The omission of any standing requirements in Section 319 would open up this process to any third party who might choose to interject itself into the process, no matter what its interest or motive. Publication requirements would encourage such intervention. Some organizations or individuals have no other interest than to limit access to lands which they desire to use for backcountry activities. Counties, on the other hand, have the interest of all of their citizens to consider: economic, social, health, safety, educational and recreational concerns are all included in their purview. It is inappropriate to open up a lengthy administrative process, which would preclude reasonable activities on R.S. 2477 rights-of-way, based upon the scanty requirements imposed by this legislation.

Section 319(c)(2)(B) requires only that a challenge state grounds "which, if proved or confirmed, would constitute reason to doubt the validity" of a claimed right-of-way (emphasis added). This standard would allow any person to file spurious statements which cannot be proven and thereby institute an administrative process which could take months or even years before the failure of substance is finally determined. It is an admitted tactic of special interest groups to try to stop a project merely by tying it up in procedural and legal requirements or delays, without regard to the merits of the issues or the ultimate outcome of the dispute. This provision invites such tactics.

A failure to file a notice of intent to hold and maintain an R.S. 2477 right-of-way, along with the requisite documentation, and to publish "information" concerning the intent to hold the right-of-way, shall be "conclusively deemed to constitute an abandonment and relinquishment of a right-of-way." (See, Section 319(b).) Thus, even if a county has maintained a road for decades, investing substantial public resources into its construction and maintenance; even if the road in question is a major public thoroughfare vitally necessary to the economic and other interests of those who travel it; even if nobody would like to see that road closed, the failure to comply with this proposed statute would automatically cause the loss of that right-of-way. Presumably, BLM, or others who really don't want to see the counties stop maintaining these roads, would then ask the counties to apply for FLPMA Title V permits to replace the R.S. 2477 rights-of-way, thus instituting a new wave of bureaucratic procedures and more federal expenditures.

Whenever an appeal is filed concerning a determination concerning an R.S. 2477 right-of-way, the right-of-way must be treated as invalid (Section 319(d)(1)). The lands must be managed "as if such right-of-way did not exist," but can be "used for lawful transportation, access, and related purposes of the same nature and to the same extent as was properly permitted by the Secretary on the date of enactment of this section." (Section 319(d)(4)(A).) Aside from the difficulties of interpretation offered by this language (e.g. what is meant by "lawful

transportation," what extent of use was "properly permitted"?), only some use of the right-of-way is protected. Maintenance for safety is not authorized. If there is a wash-out on a road, stranding vehicles, who can correct that problem?

There are additional problems of statutory interpretation offered by this legislation. Section 319(d)(5) says that "nothing in this subsection [offering a right of appeal to "any person"] shall be construed as affording any right to seek or participate in any judicial proceeding by any party not otherwise entitled to seek or participate in such proceeding." In the absence of clear statutory intention otherwise, the courts have been careful to restrict standing to contest federal actions to those parties which meet certain criteria. None of those criteria are included in other provisions of this legislation. This language offers a great opportunity for litigation, but no clarity for interpretation.

Section 319(f), the savings clause, shows that the this proposed legislation operates primarily to invalidate rights which have been heretofore valid, since the establishment, construction or maintenance of a highway sufficient to obtain the right-of-way is still honored. Nevertheless, in spite of meeting the existing requirements, in good faith, counties are now going to be required to undertake an elaborate additional procedure, open to intervention from all sides, regardless of the nature or purpose of their interests, in order to maintain the rights which have already been perfected.

Section 319(e) requires a Title V permit for any "change in the scope, alignment, or character of use of a valid right-of-way . . . ." This language is substantially more restrictive than common law or common sense would support. Some changes in scope, alignment or character of use are going to occur over time as an inherent part of the right-of-way. This provision would, once again, require administrative action, with concomitant delay and expense, for even the most minor activity deemed to trigger its application. This provision is merely another way to take away something already granted, which has been used for decades in reliance on the good faith of that grant.

All of these requirements are being proposed for a system which has, for the most part, worked very well under the current laws and regulations. Why undertake a grand scheme to change this system? Would the new statute benefit the federal land manager? While there are apparent benefits to providing the federal land manager with a clear delineation of which rights-of-way must be honored in conducting management activities, there is no benefit to the land manager to open up extensive administrative requirements beyond those which would afford an opportunity for receipt of the relevant data necessary to determine the validity or invalidity of any claim. A short deadline cannot benefit the land manager, since

the flood of materials which would come in on short notice would be a management nightmare.

There is an obvious motivation for the deadline and the opening of the process to broad public intervention: to force the relinquishment of these rights so that access to public lands is no longer offered in the same fashion it has been. Who benefits from that result? Only those who are interested in cutting off access to and across federal public lands to all who are not hardy backpackers and backcountry experts.

The bill would deny rights-of-way, which predated FLPMA and the wilderness study areas created pursuant to FLPMA, across any lands managed as wilderness study areas. Thus, whereas Congress was careful, in enacting FLPMA, to honor its prior grants, this bill would effectively reverse that policy. The underlying policy and constitutional considerations should be carefully considered before taking such unprecedented action. The damaging impacts of this one provision alone are substantial in Utah, where the scope of the R.S. 2477 right-of-way is defined as that which is reasonable and necessary for the uses to which the road was being put prior to October 21, 1976. Those are the uses which are part of the valid, existing right accepted under R.S. 2477. Yet this provision would preclude offering safe passage for those uses, since some improvements necessary to provide that safety might encroach into the broad boundaries drawn around some wilderness study areas.

Some WSA boundaries were drawn on the map with so broad a pen that it is difficult to ascertain where the boundary lies on the ground. BLM, in its recommendations for final wilderness designation, has, wisely, suggested appropriate setbacks from existing roads. This legislation would give the WSAs precedent over all legitimate considerations of prior existing rights and safety for users of these rights-of-way.

This provision would have the same effect for any right-of-way established by metes and bounds or to a specific width, since the portion of that width which BLM had ignored in establishing WSA boundaries would now be deemed invalid.

Generally, the current policies and procedures should be maintained. These policies reflect decades of practice, as well as the relevant court decisions, and have been relied upon by right-of-way holders as well as the federal land managers. Prompt administrative review and acknowledgment of R.S. 2477 claims would be beneficial to document the historical record supporting R.S. 2477 claims before it is lost over time. However, right-of-way holders must be given ample time to prepare documentation, taking into account the 110-year history of these rights. The legal principal that the existence of a road provides a presumption of its continuation, incorporated into current BLM policies, is



appropriate and should minimize the federal burden in dealing with R.S. 2477 rights-of-way.

Appropriate public notification for purposes of allowing BLM to obtain a full factual record might be beneficial. However, substantial public participation in BLM's decision-making and a formal appeal process would be counterproductive. Currently, it is estimated that the Interior Board of Land Appeals is taking up to three years to issue decisions on appeals submitted to it, without any adjudicative hearings. Given the fact that, ultimately, the issue of whether the right-of-way is valid or not can only be determined by a court of law, this lengthy process serves no useful purpose.

The principles which Congress should consider applicable to these rights-of-way have been eloquently enunciated by the federal courts. "These roads, in the fullest sense of the words, were necessary aides to the development and disposition of the public lands. . . . They facilitated communication between settlements already made, and encouraged the making of new ones; increased the demand for additional lands, and enhanced their value. Governmental concurrence in and assent to the establishment of these roads are so apparent, and their maintenance so clearly in furtherance of the general policies of the United States, that the moral obligation to protect them against destruction and impairment as a result of subsequent grants follows as a rational consequence." Central Pac. Ry. Co. v. Alameda County, Cal. 284 U.S. 463, 473, 52 S.Ct. 225, 228-229 (1932). After quoting the above language, the Colorado District Court in Wilkenson v. Dept. of Interior, 634 F.Supp. 1265, 1276 (D. Colo. 1986), said "The same principle dictates that the government must be deemed to have assented to continuing access over the disputed area and cannot cut off that access by the creation of [a "conservation system unit"] . . . ."

Section 319 will inevitably create significant burdens in the management of rights-of-way across federal public lands for both the federal agencies charged with duties under the proposed legislation and for the local governmental entities who have been managing these rights-of-way for many years. The real losses will be suffered by the people who have been using these roads to get to and from work and school, the governments who provide police and health services in rural areas and the millions of Americans not able to backpack and mountain bike but who still desire to experience the wonders of the American West. Their safety will be compromised, with no concomitant benefit to federal public lands.

This proposed legislation might be interpreted as backing down from a promise once made by Congress in good faith and honored in good faith up until now. The local governments who now hold these rights-of-way are entitled to due respect in the absence of evidence that they have acted irresponsibly. Protecting their



claims to transportation corridors essential to the functioning of local communities is responsible local government. Congress should work together with local governments to find a fair and reasonable method to resolve differences at the interface between the rights-of-way already granted under R.S. 2477 and the federal interests in the public lands traversed by those rights-of-way. This legislation works against such a goal and should not be passed.

Mr. VENTO. We will ask David Simon to present his testimony. He is with the National Parks and Conservation Association.

### STATEMENT OF DAVID J. SIMON

Mr. SIMON. Thank you. On behalf of our 350,000 members, I am pleased to present our views on H.R. 1603.

We want to commend the Chairman for his leadership in crafting this legislation and working persistently for its passage in the House of Representatives. I would hate to count the hours and the hard work that you have put in on this issue and this topic. And I think the time for delay is over in terms of enacting this bill.

NPCA's testimony will focus on the R.S. 2477 issue.

NPCA believes that without prompt action, this reconstruction era law that originated in 1866 could bring the construction of thousands of miles of widened, paved, and unneeded roads across our national parks, refuges, and wild lands, resulting in the destruction of wild lands and parks across the States subject to this law, permanently scarring pristine landscapes and creating management nightmares for Federal land management agencies.

Prompt legislative administrative action is needed to address this problem, rights-of-way.

Basically, we think Congress needs to act forcefully to end the "great western road giveaway." The committee is familiar with the history and some of the problems of the current law and its implementation and interpretation. The claims for R.S. 2477's are now skyrocketing. Counties and States are claiming highway rights-of-way to thousands of miles of dirt roads and tracks crossing the public lands.

I want to make it very clear and point out to the committee, though, that when Congress enacted FLPMA in 1976 and repealed R.S. 2477, the body recognized the need for careful control over the issuance and development of these rights-of-way in order to protect public land values and prevent environmental degradation.

Both Section 5 of FLPMA and Title XI of the Alaska Lands Act of 1980 set up detailed requirements for determining whether the conditions under which rights-of-way should be authorized and what should be done to locate and minimize damage on such rights-of-way.

Therefore, I want to emphasize that we are not out to block access to the public lands. On the contrary. Congress has set up a reasonable program. I would say that States don't need the R.S. 2477 rights-of-way for access. This bill will not extinguish accessibility. Rather, it places the burden to prove the validity of these claims squarely where it belongs.

All we are asking is that claimants meet the statutory plain language requirements of the act.

However, existing administrative interpretation of R.S. 2477 is allowing claimants to make an end run around well-established processes and environmental protection policies.

As the subcommittee knows, the worst problems are due to the current Department of the Interior policy enacted by Secretary Hodel in 1988. It virtually gives away highway rights-of-way by es-

tablishing extremely loose interpretations of the plain language requirements of R.S. 2477. And much of it is indefensible. Not only does it contradict the plain language, it is in conflict with numerous policy statements that are referenced in our statement and contradictory to Federal case law.

The potential consequences of the validation of many of these rights-of-way are significant. In fact, the National Park Service, in commenting on the current BLM study under way, calls the potential consequences "devastating." This is a strong term from an agency that is not inclined to use those types of phrases.

I have given to the committee, and asked that it be introduced into the record, the comments of the Park Service on a draft report which details some of the impacts. In Utah, for example, counties have asserted claims for more than 3,800 roads and trails. The State of Alaska has indicated plans to establish 1,700 rights-of-way. And the State has asserted claims for 3 air strips. These claims include 200 routes across national parks.

And it is important to understand that the intentions of the claimants go far beyond simple maintenance of these rights-of-way. Many claimants plan to take old trails and turn them into major roads and highways, or in one case, railroads, that would open up parks, refuges, and other public lands to full-scale resource development. In many cases—almost all cases—this would directly conflict with Congress' intent in reserving and protecting these public lands.

The NPCA believes that the existing R.S. 2477 laws are out of step with contemporary policies that recognize the need to protect our parks and unspoiled public lands.

We believe that your bill takes important steps to correct these problems, and we strongly support Section 14 of the bill.

However, NPCA believes that additional measures are justified.

First of all, I would say that a quicker solution—to comment on the procedural delays that others have raised here this morning about the bill's provisions—would be to simply terminate any further consideration or recognition of R.S. 2477 claims. This would not preclude claimants from acquiring the rights-of-way. Rather, they could be considered through the application processes of the other laws such as FLPMA and ANILCA.

Second, if claims are to be considered, NPCA believes that the bill would clearly state that claimant must provide incontrovertible evidence that the plain language requirements of R.S. 2477—that is construction of a public highway across unreserved public land—were met for the entire length of the claimed road prior to repeal of R.S. 2477 in 1976.

And, third, we believe the bill should clearly state the unqualified authority of Federal land management agencies to recognize the R.S. 2477 rights-of-way to prevent environmental damage.

It is clear that State law does not vitiate or contradict expressed statutory requirements of the Act, and we believe the Federal Government needs to continue to assert its rights in this matter. And the Federal case law will uphold that.

Mr. Chairman, we also have some short comments on the merits of the ACEC provisions of the bill. We will leave those for review in our statement.

I thank you for the opportunity to testify this morning.

Mr. VENTO. Thank you, Mr. Simon.

[Prepared statement of Mr. Simon follows:]





# National Parks and Conservation Association



TESTIMONY BY  
DAVID J. SIMON

NATURAL RESOURCES PROGRAM MANAGER  
NATIONAL PARKS AND CONSERVATION ASSOCIATION

BEFORE THE  
SUBCOMMITTEE ON NATIONAL PARKS, FORESTS AND PUBLIC LANDS  
ON H.R. 1603

A BILL AUTHORIZING APPROPRIATIONS FOR PROGRAMS,  
FUNCTIONS, AND ACTIVITIES OF THE BUREAU OF LAND MANAGEMENT  
FOR FISCAL YEARS 1994 THROUGH 1997  
MAY 25, 1993

Mr. Chairman and members of the subcommittee, my name is David J. Simon. I am the Natural Resources Program Manager for the National Parks and Conservation Association (NPCA), a nonprofit citizens' organization dedicated to the protection and enhancement of the National Park System. On behalf of the National Parks and Conservation Association's 350,000 members, I am pleased to present our views on H.R. 1603, a bill to reauthorize programs of the Bureau of Land Management and amend the Federal Land Policy and Management Act of 1976 (FLPMA).

NPCA commends the Chairman for his leadership in crafting this legislation and working persistently for its passage in the House of Representatives during both the 101st and 102nd Congress.

My testimony today will focus on two important subjects addressed by H.R. 1603: (1) Revised Statute 2477 rights-of-way claims, and (2) Areas of Critical Environmental Concern.

## REVISED STATUTE 2477

Rights-of-way claims now being asserted under Revised Statute 2477 (known as RS 2477) are an extremely serious threat to our national parks, wildlife refuges, and public lands. Prompt legislative and administrative action is needed to address this problem.

RS 2477 is a one-sentence section of the "Lode Mining Act" of 1866 which states: "The right-of-way for construction of highways over public lands, not reserved for public uses, is hereby granted." RS 2477 was repealed by FLPMA in 1976, but "existing rights" were preserved.

The language of RS 2477 clearly requires that in order for a right-of-way claimed under RS 2477 to be valid, the right-of-way must meet four tests. The road:

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- ◆ must have been "constructed";
- ◆ must have received sufficient regular, unrestricted, and continuous use as to have become a public "highway"; and
- ◆ must traverse lands which, at the time the highway was constructed and used by the public, were "public lands not reserved for public uses";

For a RS 2477 claim to be valid, it also must have satisfied the above requirements prior to repeal of RS 2477 by FLPMA in 1976.

Claims for "pre-1976" RS 2477 rights-of-way are now skyrocketing. Counties and states across the West and in Alaska are claiming highway rights-of-ways to thousands of miles of dirt roads and tracks crossing the public lands, national parks, and wildlife refuges. If these claims are granted, the result could be a tangled web of widened, paved, and unneeded roads across our public wildlands and parks, permanently scarring pristine landscapes and creating a management nightmare.

When it enacted FLPMA in 1976, Congress recognized the need for careful control over the issuance and development of rights-of-way in order to protect public land values and prevent environmental degradation. Section V of FLPMA set up detailed requirements for determining whether, and the conditions under which, a right-of-way should be authorized and where it should be located to minimize damage. FLPMA requires detailed analysis of environmental impacts before a right-of-way is granted, and imposes specific protective conditions as necessary to avoid or minimize damage to environmental values. In 1980, Congress also established a detailed regime for considering rights-of-way across the public lands in Alaska, which is contained in Title XI of the Alaska National Interest Lands Conservation Act (ANILCA).

Existing administrative interpretation of RS 2477, however, allows claimants to make an end run around those well-established processes and environmental protection policies. The worst problems are due to the current Interior Department policy on RS 2477 issued in December 1988 by former Secretary of Interior Donald Hodel. The Hodel policy completely misinterprets the plain language of the statute and will result in public land management chaos if it continues to be implemented in its present form.

Problems with the Hodel policy are now well known to the subcommittee. Basically, the problems arise from the deviations of the Hodel policy from the specific requirements of the statute.

First, the Hodel policy virtually gives away highway rights-of-way by establishing extremely loose interpretations of the plain language requirements of RS 2477:

- ◆ "Construction" was interpreted to mean no construction activity had to occur. "Mere use" or "cutting high vegetation," or rolling a few rocks out of the way was inserted as a standard for "construction";

- ◆ "Highway" establishment was based on mere pronouncement rather than actual established public use for highway purposes;
- ◆ "Highway" was interpreted to recognize even fragmented sections of road that do not "go anywhere" because of repeated interruptions by reserved lands, state school sections, or other lands not open to RS 2477 claims.

In most cases, any claimant who does little more than make an unsubstantiated assertion that a route existed prior to 1976 (the year RS 2477 was repealed by FLPMA) will receive a highway right-of-way under RS 2477. In practice, this means that highway rights-of-way could be given away for virtually any dirt road, track, footpath, or even dogsled route claimed under RS 2477.

Second, under the Hodel policy, federal land management agencies have pretended that they have extremely limited authority to regulate development of recognized RS 2477 rights-of-ways. Claimed roads may be widened, paved, and even turned into major thoroughfares with little or no environmental review, federal regulation, or public input. This is true even in national parks, where rights-of-way are normally seldom allowed unless they serve park purposes.

The potential consequences to our national parks, wildlife refuges, and public wildlands would be nothing short of devastating. Unless legislative and administrative action is taken, treatment of RS 2477 claims under the Hodel policy will lead to wholesale giveaways of public resources, undermine effective land management, and destroy public land values.

As of March 1993, just five counties in Utah have asserted RS 2477 claims for more than 3,800 roads and trails, totalling thousands of miles. The claimed roads, many of which are now nothing more than unimproved dirt roads or vehicle tracks, traverse Bureau of Land Management wildlands, national park units, critical wildlife habitat, and sensitive watersheds.

The State of Alaska had indicated plans to assert RS 2477 claims for 1,700 roads, tracks or dogsled trails. Current Lt. Governor Jack Coghill said in 1985 that the state's intent is "to make a map of Alaska look like a plate of spaghetti." The claims include approximately 200 routes located in 13 of the 15 National Park System units in Alaska. Yet preservation of intact wilderness ecosystems was the primary purpose Congress designated these areas as parks and preserves. The following table presents a sample of the problem in just six of the park units in Alaska:

| <u>National Park System Unit</u>               | <u>Number of RS 2477<br/>Claims Identified by<br/>the State of Alaska</u> |
|------------------------------------------------|---------------------------------------------------------------------------|
| Bering Land Bridge National Preserve           | 15                                                                        |
| Denali National Park and Preserve              | 30                                                                        |
| Gates of the Arctic National Park and Preserve | 7                                                                         |
| Glacier Bay National Park and Preserve         | 6                                                                         |
| Wrangell-St. Elias National Park and Preserve  | 110                                                                       |
| Yukon-Charley Rivers National Preserve         | 10                                                                        |

It is important to understand that the intentions of most RS 2477 claimants go far beyond maintaining access to old mining claims and homesteads. Many claimants plan to take old trails and turn them into major roads or highways (or even railroads) that would open up parks, refuges, and other public lands to full-scale tourism or resource development.

In a January 14, 1993 memo to the Task Force drafting the Interior Department's pending report on RS 2477, the National Park Service (NPS) describes the potential adverse impacts of RS 2477 rights-of-way on park units:

The impact of RS 2477 rights-of-way in National Park units could be devastating. . . . Possible RS 2477 rights-of-way in NPS areas could cross many miles of undisturbed fish and wildlife habitat, historical and archeological resources, and sensitive wildlands. Wilderness or potential wilderness could also be crossed by potential RS 2477 rights-of-ways.

Validation of possible RS 2477 rights-of-way assertions would undoubtedly derogate most unit values and seriously impair the ability of the NPS to manage the units for the purposes for which they were established. . . .

State and local governments as well as individual interests have given recent indication that assertions for RS 2477 rights-of-way may be made for various purposes including mining, ranching, resource extraction, and diverse economic development pursuits. If validated, these assertions will have a severe negative impact on areas managed by the NPS, not only from the rights-of-way themselves but from the associated development. . . .

Potentially, there are thousands of possible RS 2477 rights-of-way in the western units of the National Park Service. Many of these possible rights-of-way are extensive and, if validated, would impair scenic, natural, historic, wildlife, and wilderness resources. Also impaired would be the ability of the NPS to manage its areas for purposes for which they were established.

RS 2477 rights-of-way are fundamentally out of step with contemporary policies that recognize the need to protect our parks and remaining unspoiled public lands. New legislative or administrative initiatives, or both, should address that inconsistency. The Hodel policy and its lax standards must be revoked immediately. New legislation and administrative policies should be adopted to protect parks and public lands from the wholesale giveaway of public resources under RS 2477.

H.R. 1603 takes important steps in that direction. NPCA strongly supports Section 319(a) of H.R. 1603, which establishes a "sunset" requirement that will terminate the continuing belated assertions of rights-of-way that fundamentally conflict with contemporary federal lands management policies. We also strongly support Section 319(e), which explicitly recognizes what should have been obvious to BLM: that the scope and character of use of a RS 2477 right-of-way could not be expanded after the statute was repealed in 1976.

However, NPCA believes that Congress should take additional measures to rectify the problems with existing RS 2477 policy. First, NPCA recommends that any further consideration or recognition of RS 2477 right-of-way claims be terminated. Terminating further consideration and recognition of RS 2477 rights-of-way would not preclude claimants from acquiring needed rights-of-way. Rather, all claims for legitimate right-of-way needs would be considered through applications under the other right-of-way laws that include provisions for environmental protection, such as FLPMA and ANILCA. Where denial of an application is required to protect environmental values, claims that the denial involved a taking of a "prior existing right" under RS 2477 can be compensated if "taking" of a valid prior-existing right is actually proved.

Alternatively, if RS 2477 claims continue to be considered, new legislative or administrative policies, or both, should be adopted which allow recognition of a RS 2477 claim only if a claimant can provide incontrovertible evidence that the plain language requirements of RS 2477 -- "construction" before 1976 of a public "highway" across "unreserved public land" -- were met for the entire length of the claimed road prior to repeal of RS 2477. In addition, new legislation or administrative policies, or both, should be adopted which recognize the unqualified authority of federal land management agencies to regulate any recognized RS 2477 rights-of-way to the full extent necessary to prevent environmental damage.

It is critical that both legislative and administrative action to address RS 2477 issues and the Hodel policy be pursued promptly. RS 2477 determinations under the Hodel policy could create an environmental nightmare that will unnecessarily devastate park and public land values unless action is taken immediately.

In taking steps to address the problems created by RS 2477 and the Hodel policy, the subcommittee should be aware of the indefensibility of the current Hodel policy. To begin with, it contradicts both the plain language of RS 2477 itself, as well as previous Interior Department policy statements. For example, although it asserts that the mere "passage of vehicles by users over time" may satisfy the "construction" requirement, the Hodel policy has never offered any credible legal justification for ignoring RS 2477's requirement for "construction" of a highway. The Hodel policy is directly in conflict with the following official statements by the federal government:

- ◆ A 1898 ruling by the Interior Secretary which rejected RS 2477 claims based simply on section lines because no "actual construction" was shown;<sup>1</sup>
- ◆ A 1980 opinion by the Interior Solicitor's Office insisting that actual construction is required, and that "construction ordinarily means more than mere use, such as the creation of tracks across public lands by the passage of vehicles";<sup>2</sup>
- ◆ BLM guidance to a District Manager in Oregon which requires a claimant to show the history of construction of the claimed road; and
- ◆ A 1987 BLM Nevada State Office Instruction Memo rejecting "public use" as synonymous with actual construction because it does not "meet the express criteria of RS 2477."<sup>3</sup>



The Hodel policy is similarly inconsistent with federal court opinions, including a 1988 opinion by a federal district court in Utah, that required detailed findings about actual construction as the basis for determining existence of a RS 2477 right-of-way. Similarly, the Hodel policy grossly misinterprets and ignores federal case law in asserting that Interior agencies have no management control over RS 2477 rights-of-way except to prevent "undue and unnecessary degradation" of the "servient estate." That standard reflects a gross misinterpretation of the 10th Circuit's opinion in the Burr Trail litigation.<sup>4</sup> The opinion focused solely on the "unnecessary or undue degradation" standard because the case was confined to claims for protection of wilderness under Section 603(c) of FLPMA, which utilizes that standard. More relevant to the full scope of proper regulatory authority was U.S. v. Vogler<sup>5</sup>, a case involving a mining access road in an Alaska park unit (Yukon-Charley National Preserve), in which the court held that the National Park Service has authority to regulate RS 2477 rights-of-way to avoid impairment of park resources.

Finally, we want to address the issue of "takings," which undoubtedly will be raised by those opposing legislative or administrative action on RS 2477. While we believe "takings" of legitimate RS 2477 rights-of-way should be authorized as necessary to prevent environmental damage, the likelihood that many "takings" will occur is small.

If a right-of-way claimed under RS 2477 is denied because a claimant fails to prove that the requirements of the statute were met, no taking would occur because there was no basis for the claimed right. Furthermore, even extensive regulation of recognized RS 2477 rights-of-way should not constitute a taking because RS 2477 does not grant any title to land or possessory interests -- only a privilege of reasonable use. Even if that use is heavily regulated, no taking will be deemed to have occurred so long as there remains some opportunity for reasonable use similar to that prevailing before 1976.

#### AREAS OF CRITICAL ENVIRONMENTAL CONCERN

NPCA also supports Section 3 and Section 8 of H.R. 1603. These sections amend the definition of "areas of critical environmental concern," and call for management of the public lands to avoid effects that would impair or damage the resources and values of our national parks.

These provisions are needed to help assure that the Bureau of Land Management (BLM) acts as a good neighbor to the national parks.

As this subcommittee knows, the long-term protection of our national parks -- particularly the large pristine natural areas of the West and the unique cultural sites of the Four Corners area -- depend on the compatible management of adjacent BLM lands. BLM lands abut or surround more than 30 national park units in Utah, Colorado, Arizona, New Mexico, Nevada, California, Wyoming, and Idaho. Scenically and ecologically, lands administered by the BLM often are integral to the resources protected within our parks. Unless BLM is a good neighbor to our national parks -- planning for and managing its lands in a manner that avoids derogation of park resources -- the important values of many of our parks will be degraded.



We have testified previously before this subcommittee on predecessor bills to H.R. 1603, detailing BLM's failure, and at times refusal, to plan for and manage its lands in a manner compatible with the protection of adjacent park values. We offered as a primary example the FLPMA planning process for the San Juan Resource Area in southern Utah. This 1.8 million-acre area includes outstanding scenic and natural areas that surround or abut, and are ecologically integral to, four National Park System units (Canyonlands National Park, Natural Bridges and Hovenweep national monuments, and Glen Canyon National Recreation Area). During that planning process, the National Park Service filed extensive comments, identifying important areas on the public lands where activities contemplated by BLM's proposed management plan threatened serious inconsistency with park protection. The Park Service made specific recommendations for more consistent management, including recommendations for "area of critical environmental concern" designations.

As NPCA has previously testified, however, the Park Service requests were rejected by the Utah State Director as well as by the Director of the Bureau of Land Management. BLM rejected Park Service requests despite specific provisions in FLPMA's implementing regulations requiring BLM to seek consistency with the approved plans and policies used to guide management of adjacent federal lands. Furthermore, BLM's rejection of Park Service requests for ACEC designation occurred despite provisions in BLM's own manual underscoring BLM's obligation to evaluate whether the important values for which park units were established extend onto BLM lands, and therefore warrant ACEC designation.

Unfortunately, these kinds of problems continue to plague efforts by the Park Service and others to work cooperatively with BLM to ensure careful stewardship of BLM lands adjacent to park units. Thus, we strongly support Section 3 of H.R. 1603 as a critically needed step to help assure that BLM is a good neighbor to our national parks.

1. 26 L.D. 446 (1898).
2. Letter and Memorandum from Deputy Solicitor Ferguson to Ass't Attorney General Moorman, April 28, 1980.
3. BLM Instruction Memorandum to District Managers, Nevada and Deputy State Directors and Staff Chiefs from State Director, Nevada, "Grant of Right-of-Way Under RS 2477" (BLM Nevada State Office Instruction Memorandum NV-87-322, June 4, 1987).
4. *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988).
5. *U.S. v. Vogler*, 859 F.2d 638 (9th Cir. 1988).

Mr. VENTO. And finally we have Ms. Cynthia Shogan.

### STATEMENT OF CYNTHIA SHOGAN

Ms. SHOGAN. As you mentioned, I am with the Southern Utah Wilderness Alliance. We wholeheartedly support H.R. 1603 and look forward to its final passage. I am going to focus on R.S. 2477. I think it is interesting to note that it was 2 years ago that I came before this subcommittee, again on BLM reauthorization, and I observed at that time that while BLM was developing its land management plans and in its planning process, that the agency had no idea where R.S. 2477 claims were, how many there were, and the nature of those claims.

At that time there were less than 100 claims in the State of Utah. And very few people had any idea what R.S. 2477 stood for or what it meant. Today, everybody knows what R.S. 2477 is. It is a household word and there is a potential of 10,000 claims in Utah alone. It is a means of exerting control over the Federal lands. Recently, Garfield County in southern Utah has filed a title action against the United States in Federal District Court. They are challenging BLM's refusal to acknowledge the county's unlimited right to realign and expand an acknowledged R.S. 2477 right-of-way. The present realignment would require a speed limit of 10 miles an hour across a stream bed. However, the county has a new plan calling for building a new road inside a wilderness study area.

Millard County has threatened a lawsuit over a claimed road in an established wilderness study area, although BLM determined that the King Top WSA was roadless in 1980. The county claims that this R.S. 2477 bisects this WSA. If this challenge is successful, King Top WSA could be the first potential wilderness area that is removed from congressional consideration.

The primary reason for a lot of these actions was a policy developed under Secretary Hodel, and you heard from Dave some of the inadequacies of that policy. However, the liberal attitude in the Hodel policy led to misinterpretation. If you review some of the comments that the Department of the Interior received on a draft report, many people don't realize that R.S. 2477 was repealed in 1976. Many people think it is a new law. R.S. 2477 proponents argue the need for access, however, for those valid existing rights requiring public access such as mining and grazing. Congress has already guaranteed that access. And more important, in cases where access is required, but not connected to an already established valid existing right, Title V of FLPMA provides more than adequate process for establishing rights-of-way. Clearly something needs to be done to resolve this contentious issue, and the R.S. 2477 provisions in this legislation are a much needed first step.

We are particularly pleased with the bill's attempt to finalize this matter once and for all and to establish a deadline for future claims. It is crucial for the Department's agencies to have an adequate understanding of the number and nature of these rights-of-way crossing our Federal lands, and the bill goes a long way toward understanding the potential conflicts regarding the scope of these roads when the claims are recognized by the land management agencies in Utah.

There are only 10 recognized R.S. 2477 rights-of-way, but already there are conflicts over the scope and use of these roads, spawning lawsuits, several administrative appeals, and a significant amount of ill will directed at the Federal Government.

We have three suggestions regarding H.R. 1603's R.S. 2477 language. First, it should be made clear that the scope of the rights-of-way would be fixed as they existed October 21, 1976, when R.S. 2477 was repealed by the Federal Land Policy Management Act. Second, we believe that this Congress would express its explicit intent to adopt Federal law as it applies to the scope of any R.S. 2477 rights-of-way.

Third, only by rejecting the application of several State laws that exist can the scope of a rights-of-way be definitively measured at the time that a land manager recognizes a particular claim. Congress should definitely take this opportunity to put to rest the notion that land managers do not have the authority to regulate the use of R.S. 2477 rights-of-way by providing clear direction to the Department of the Interior that they need to manage these lands in accordance with the principles found in FLPMA.

If you have any questions, I would be happy to answer them.

Mr. VENTO. Thank you kindly for your testimony.

[Prepared statement of Cynthia Shogan follows:]



## SOUTHERN UTAH WILDERNESS ALLIANCE

BEFORE THE  
UNITED STATES HOUSE OF REPRESENTATIVES  
SUBCOMMITTEE ON  
NATIONAL PARKS, FORESTS, AND PUBLIC LANDS

TESTIMONY OF  
SOUTHERN UTAH WILDERNESS ALLIANCE  
ON H.R. 1603

MAY 25, 1993

Mr. Chairman, members of the subcommittee, my name is Cindy Shogan. I am the Washington Representative for the Southern Utah Wilderness Alliance, and I thank you for the opportunity to testify on behalf of that organization and its 10,000 members. The Southern Utah Wilderness Alliance, or SUWA, is a nonprofit organization dedicated to the preservation of the remaining wilderness in Utah and the proper stewardship of all of our nation's federally-owned lands.

Today, I wish to address this subcommittee on a malignant anachronism of public land law, Revised Statute 2477. As an organization, SUWA is intimately familiar with the problems associated with R.S. 2477 and the threat it poses to proper land management. SUWA has been a plaintiff in the now infamous Burr Trail case, currently before the Tenth Circuit Court of Appeals. SUWA has also filed several appeals before the Interior Board of Land Appeals involving this issue, and has closely tracked the explosive proliferation of R.S. 2477 claims in Utah over the last two years.

As this Committee is no doubt by now well aware, R.S. 2477 was passed in 1866 as a means of facilitating access to mining claims in the wide open west. In an age when Manifest Destiny was at the heart of our public policy, Congress sought to devise the means by which the American public could conquer and subdue the frontier. Legislation such as the Homestead Act and the Mining Law of 1872 embodied that policy, as did R.S. 2477 by providing virtually unlimited access to public lands with no requirement for formal acceptance of the statute's terms.

Over the next 110 years, vast changes occurred in the western United States, which led to the repeal of most of the land disposal statutes like the Homestead Act. And in 1976, Congress repealed R.S. 2477 as well, but not before the thousands of rights-of-way now being claimed were presumably established.



It is now this plethora of claims that is threatening to undermine the very policy on which the Federal Land Policy and Management Act was established. Let me explain.

In its Draft Report to Congress on the History and Management of R.S. 2477 Rights-of-Way Claims of Federal and Other Lands, the Department of the Interior indicates that there are presently almost 4,000 separate R.S. 2477 road claims before its agencies. In the state of Utah alone, there are now more than 3,800 individual R.S. 2477 right-of-way claims pending before the Bureau of Land Management. These claimed roads cross public lands that comprise some of the most unique and spectacular landscapes in the world. Many are nothing more than vehicle tracks in the desert sand, or routes across slickrock so precarious that it is impossible to travel faster than five miles per hour.

In Alaska, the state government has indicated plans to assert claims to more than 1,700 separate R.S. 2477 rights-of-way. Over 200 of these claims lie within the boundaries of National Park System units set aside for their astounding scenic, biotic, and other natural qualities.

In all, the Department of the Interior has estimated that up to 17,000 potential claims could be brought before land managing agencies, and 10,000 of these potential claims are in Utah.

But I want to be clear on the full extent of the problem at hand. We are not talking about innocuous access routes, we are not talking about expendable public lands, and we are not talking about a problem that can be adequately addressed and managed by the agencies entrusted to care for our valuable public resources. Many, if not most of the claimed rights-of-way simply do not meet the common definition of a road; they are, as I have said, mere lines in the sand. Others in Alaska are nothing more than dogsled trails over snow, never even touching the ground they cross. But under the law as it is applied now by the United States Department of the Interior, any of these routes could be expanded to become major paved highways capable of accommodating tractor-trailers.

Throughout the west and Alaska, these claims are being brought in some of the most sensitive and critical areas still within the federal land system. Vast roadless areas in Utah that qualify as potential additions to the Federal Wilderness Preservation System are being held hostage by claims that "roads" run through them. Obviously, if these claims are legitimized under existing law and policy, wilderness in these areas, by definition, will no longer exist. But more than wilderness is at stake. Some of this country's most outstanding natural areas such as Denali National Park in Alaska--managed especially to minimize vehicular conflicts with its wildlife--are targeted by



R.S. 2477 claims that would cut into the heart of their untouched landscapes.

But to date, Interior Department policies have rendered the Bureau of Land Management and Park Service powerless to prevent or adequately regulate R.S. 2477 claims in even the most sensitive areas. Thus, when the thousands of pending R.S. 2477 right-of-way claims are considered in their present context, this nation's federal lands are at serious risk of being overrun by a network of roads beyond the control of the federal government.

Many of the management problems now faced by federal land managers in dealing with the R.S. 2477 issue could perhaps be eased if a spirit of cooperation would be adopted by the advocates of unlimited federal lands access. But unfortunately, the proponents of R.S. 2477 -- most notably rural county governments -- see R.S. 2477 as a viable weapon in their struggle to reduce the amount of influence the federal government exercises in federal lands management. Most recently, Garfield County in southern Utah has filed a quiet title action against the United States in federal district court, challenging the Bureau of Land Management's refusal to acknowledge the County's unlimited right to realign and expand an acknowledged R.S. 2477 right-of-way. The present alignment would require the County to post a speed limit of ten miles per hour across a stream bed, while the County's new plans call for building a new road inside a Wilderness Study Area.

Another Utah county has also threatened a lawsuit over a claimed road in an established Wilderness Study Area in western Utah. Although BLM determined that the King Top WSA was roadless in 1980, Millard County, eager to suspend the limits imposed on mineral exploration in the WSA under FLPMA, claims that an R.S. 2477 right-of-way bisects the area. If this challenge is successful, the King Top WSA could be the first ever potential wilderness area removed from Congressional consideration as a result of anti-wilderness litigation.

But unfortunately, Utah is not unique. In Alaska, the state government has assumed authority that allows it to claim all potential R.S. 2477 rights-of-way within its boundaries. Alaska's motives have been made clear: the Lt. Governor has publicly announced that the state's goal is "to make a map of Alaska look like a plate of spaghetti."

Perhaps the primary reason for these attitudes is the policy developed by the Department of the Interior late in 1988 by the outgoing secretary, Donald Hodel. That policy ignores well-founded principals established by Congress and previous Interior Department appointees by establishing a very liberal attitude toward R.S. 2477 determinations by the agencies within the Department. As a consequence, it has encouraged a proliferation

of claims based on neither a true reading of the statute nor serious documentation of their existence.

Substantively, there are some key problems with the Hodel policy. The policy equates vehicular travel over a defined route with R.S. 2477's requirement that some form of construction occur. Yet this is the very approach that Congress rejected when it passed the wilderness provisions of FLPMA by requiring actual mechanical construction of roads before public lands could be excluded from wilderness consideration because of the presence of such roads. And it is this approach that has led to the proliferation of so many R.S. 2477 claims within areas that still qualify for wilderness designation. Many areas that remain roadless under Congress' definition of wilderness are threatened by the existence of vehicle "ways" that could become paved thoroughfares under the Hodel policy.

The Hodel policy also fails to require even minimal evidence that an R.S. 2477 right-of-way actually existed at the time of the statute's repeal in 1976. A simple declaration by a representative of the governmental entity claiming the road to the effect that the road was open to public use is enough. Yet, because R.S. 2477 was repealed when FLPMA was passed in 1976, any rights-of-way constructed under the statute must have been conclusively established by that date, at the very latest.

The Hodel policy also makes completely unsupported assumptions about federal agencies' lack of management authority over acknowledged R.S. 2477 roads. The policy states that the Department of the Interior has no authority to regulate activities that take place on a given R.S. 2477 right-of-way. Yet clearly there is a plethora of public land laws that create the authority and the duty on the part of the Bureau of Land Management and other agencies to avoid adverse impacts to federal lands. Despite the fact that significant judicial opinions have reached this conclusion, the Interior Department continued to adhere to the lax standards set by the Hodel policy.

This liberal attitude toward R.S. 2477 claims has led to a serious misinterpretation of what the statute actually provided in 1866. It is clear from the comments received by the Department of the Interior in response to its Draft Report to Congress that to the vast majority of the proponents of these rights-of-way, the R.S. 2477 concept is a relatively new one. Unfortunately, many perceive the Hodel policy to be the law of the land. This confusion of simple Interior Department guidance with statutory authority has created a myth among rural communities in the public lands states, and is directly responsible for the invalid assumption that many valid existing rights have been created in the form of rights-of-ways

It is also worth noting that many of the arguments made by those espousing the virtues of R.S. 2477 rights-of-way fail to account for the alternatives for providing means of public lands access. For those valid existing rights requiring public land access such as mining or grazing, Congress has already guaranteed access. More importantly, however, in cases where access is required, but not connected to an already-established valid existing right, Title V of FLPMA provides a more than adequate process for establishing rights-of-way. We support the use of FLPMA Title V as such an alternative; it considers both the continuing vital interest of public lands access while at the same time providing land managers with the ability to properly manage important ecological and environmental values.

Clearly, something must be done to solve the burgeoning problem of R.S. 2477 rights-of-way. Mr. Chairman, we believe that the R.S. 2477 provisions of H.R. 1603 take a significant and much needed step in that direction. In particular, in consideration of the potential for the many future claims that may be brought before the Department of the Interior at any time, this bill's attempt to finalize this matter by establishing a deadline for all future claims will add a significant measure of certainty to land management and planning. It is crucial for the Department's agencies to have an adequate understanding of the number and nature of rights-of-way crossing federal lands.

Mr. Chairman, we believe that this bill also demonstrates an understanding of the potential for future conflicts that stems directly from the uncertain nature of the scope of these roads when claims are recognized by federal land managing agencies. Although in Utah to date only ten R.S. 2477 assertions have been recognized by the Bureau of Land Management, conflicts over the scope and use of these roads have spawned at least two federal law suits, several administrative appeals, and a significant amount of ill will directed toward the federal government. Thus, H.R. 1603's attempt to define the scope of an R.S. 2477 right-of-way considers a very important aspect of the R.S. 2477 problem. However, we believe some clarification is in order.

First, it should be made clear that the scope of a right-of-way acknowledged under R.S. 2477 will be fixed as it existed on October 21, 1976, when R.S. 2477 was repealed by the Federal Land Policy and Management Act. Second, Mr. Chairman, we believe that this Congress should express its explicit intent to adopt federal law as it applies to the scope of any R.S. 2477 right-of-way. Only by rejecting the application of the several state's laws can the scope of an R.S. 2477 right-of-way be definitively measured at the time a land manager recognizes a particular claim. And finally, this Congress should seize the opportunity to put to rest the notion that land managers have no authority to regulate the use of R.S. 2477 rights-of-way by providing clear direction to the Department of the Interior to manage these rights-of-way

in strict accordance with the principals espoused by FLPMA.

In closing, I would like to offer one caveat. Although we support the application of Title V of FLPMA as a viable alternative to R.S. 2477, the provisions of the Act and its implementing regulations are rarely enforced. In theory, Title V offers a reasonable balance between the needs of access and the need for environmental control. In practice, FLPMA rights-of-way are routinely granted with little or no consideration for the environmental values at stake. We believe that this is the result of a lack of clear guidance to agencies responsible for issuing public lands rights-of-way. We also believe that Congress can play an important role now by announcing clear support for adherence to the environmental values and policies embodied in the 1976 Act.

Mr. Chairman, members of the Committee, thank you again for this opportunity to testify. I will be happy to answer any questions you may have.

Mr. VENTO. Mr. Cenarrusa, everyone is talking about R.S. 2477 today, and there is, I would point out, a study required by the appropriation bill last year, rather than a recordation requirement, an appropriations amendment that passed the House late one evening and was of some controversy in terms of its winging its way to conference committee.

In any case there is a study going on in regards to that matter which I am certain will be an important guide for the subcommittee and for the Congress in terms of what we might do. There also, of course, is the potential for action by the administration to deal with some of the inconsistencies that have occurred and to try and rectify these matters.

I might say in response to Ms. Hjelle, that if it takes that long in terms of appeals, that certainly indicates a place where BLM ought to place adequate personnel and resources to respond more timely to questions. Let me get back to that appeal process in a minute. But the concern, Mr. Cenarrusa, is the one in terms of trying to have time to apply.

Obviously, if the legislation passes this year, let's say, and were even enacted early, and would provide for recordation, how much time do you think would be necessary in order for the claims to be made? If these are known rights-of-way by the individual landowner with some notification in newspapers and other legal publications, what would be the proper time for notification?

Mr. CENARRUSA. Well, Mr. Chairman, a group of us went over this bill, H.R. 1603, and that was the highlight of our concerns.

Mr. VENTO. Yes, I understand that.

Mr. CENARRUSA. That it would not give us enough time. This subject is fairly new in the State of Idaho, and in fact, many of us were not aware of this until about February. I might say that even the Land Board was not very well aware of this. And we have the feeling that if all the filings are closed by next January, that we just won't have enough time.

Mr. VENTO. Well, you understand that these are only claims that would be for roads prior to the FLPMA Act which was passed in 1976. So basically if a party had a right-of-way that was being used, it was actually something that was initiated a long time ago, actually at least some 17, 18 years now. And so there is nothing that would be valid that would be initiated or being used right now, just been initiated in the last 20 years, let's say.

So, that is the concern, in terms of leaving this continue. I think we want to bring this to closure and provide for recordation.

Now, the other point that was made was about the extensive appeal process, but I thought, Ms. Hjelle, isn't that a defense for those that might want to make a claim as well as those that might want to challenge it?

Ms. HJELLE. Well, I think having an opportunity for parties to submit information to BLM so that BLM can be fully informed in recognizing or choosing to invalidate an R.S. 2477 right-of-way is appropriate. But when you have a two-tiered adjudicatory process and a two-tiered review process, that is a very lengthy process, and an expensive one. And so the concern is twofold.

One is that the burdens on both Federal and State resources going to a multi-tiered review process could be better spent focus-



ing in on the relevant facts of what was necessary to acquire one of these rights-of-way, and were those rights, in fact, acquired, were those characteristics in fact met prior to October 21, 1976. That should be pretty straightforward.

And once that is done, it is really going to be a matter for the courts one way or another, anyway. And it seems to add this two-tiered process—

Mr. VENTO. Well, I think the other point is that if you can resolve it administratively, I totally agree. Do you just prefer a simpler review process and then if necessary a judicial resolution or do you want to eliminate the administrative review process?

Ms. HJELLE. Well, I think to eliminate the administrative review process would be the right way.

Mr. VENTO. Then you would be into a complete court situation with almost every situation. The presumption is that most of these on their face are not going to be a problem. I guess it is how you approach this in terms of what you think is going to be a problem.

If you think that every one is going to be a court case—but I assume that most of these won't be, especially given the type of illustrations that you have provided, that certainly dealt with construction in most of those. I don't know if it was all done before 1976, but if it wasn't, it obviously is a case that given the asphalt that you put down, that you are going to be trying to buy land from the national government, so I don't know what the—

Ms. HJELLE. The fact of the matter is that the roads like that probably aren't going to be too much of a problem, but take the Burr Trail road which was a not a paved road, it was one-and-a-half to two-lane dirt road. That has been in litigation now for many years and that litigation has not arisen by initiation of Garfield County, except after Garfield County essentially was pushed into a corner. With regard to the representations made here about the most recent litigation filed by Garfield County, I filed that litigation. I know exactly what it was about. And it was very much not about Garfield County claims that it has unlimited rights to develop and improve its road on public lands.

Garfield County's position is very specific, very clear, and it claims a limited right to maintain its road only as minimally necessary to meet applicable safety standards. And it tried every way it could to avoid having to get to that point by looking for every engineering standard that would comply with that. But BLM will not honor Garfield County's right at this point to have a safe road in that location.

Mr. VENTO. Are you talking about this Burr Trail?

Ms. HJELLE. I am talking about the most recent litigation indicating that Garfield County was claiming full right to impact the Federal lands.

Mr. VENTO. I think part of that was the interpretation of the Department of the Interior as to what happens. It may not be your intention to do that, but once the right is established and this has been aggravated, I would say in my opinion, by the overreach of the Department of the Interior and the decade of the 1980s. Overreach in terms of saying, you have this, you can do a whole variety of things.

I suppose it helps in terms of eliminating regulation, and so forth, but it also opens you up to criticism and opens up a broader controversy. So that is where we are at. Maybe some of that will be changed and it will turn the temperature of this down. But you may not intend and may not want to do that and may not have the money to do it, but that is the type of expansion of the right, I would say, in my judgment, in the 1980s that has led you to this type of debate.

Ms. HJELLE. I respectfully disagree with you because I don't believe the right has been expanded in the 1980s; I believe that the right has been cut back in the 1980s.

Mr. VENTO. Well, I think that is a problem. Mr. Simon.

Mr. SIMON. Mr. Chairman, if I could comment briefly on this. One of the reasons the lawsuit developed over the Burr Trail is because of the BLM's complete refusal to take any kind of action in any regard virtually to protect public land values, including when it was considering an expansion in the scope of rights-of-way.

And it did take a lawsuit to force the Bureau of Land Management into an environmental assessment just on that one particular portion so we are concerned that in the current vacuum of sensible policy that the assertion or validation of these claims, even under the pretenses, which I accept as honest, that she is presenting as the goals of the county, there are some serious issues to be concerned with when we have such a vacuum of policy.

Mr. VENTO. Well, Ms. Hjelle, not to continue this particular debate, but about the status of the roads in the photos that you shared with the committee, are these covered by pending applications of existing rights-of-way or have they been clearly established?

Ms. HJELLE. Well, I can't answer that question vis-a-vis each particular record, but some of them I know are in Garfield County. It is my understanding that Garfield County has submitted applications for all of that is R.S. 2477. So I would assume that in Garfield County the answer to that question would be yes.

Mr. VENTO. Applications pending or granted?

Ms. HJELLE. If I might, as I understand your legislation, all of those prior applications would be nullified and a whole new process would be required.

Mr. VENTO. That is not my interpretation or intention of what it is. In other words, if applications have been made and claims have been upheld, those are valid property rights and they exist, so all we are dealing with is the unrecorded roads.

I may disagree with Burr Trail. As you know, I didn't agree that we should improve it—in terms of national government funding for improving it. That was the debate here. Not necessarily to the fundamental application and rights to have it; that exists. So we have no intention of challenging those whatsoever.

It may be at that time the law was there, the rights exist, we want people to exert them in a proper way so that we can get them recorded and be once and for all done, otherwise it ends up being endless.

The further we get in time forward from the repeal, 1976, and the use of these, the exercise which occurred between 1866 and 1976, the more difficult it is, so we are really dealing with scraps

of information. So my intentions are good intentions, to try to bring this to a resolution.

I certainly understand concerns of the States that are involved, especially with the States where there is a substantial amount of Federal landownership so that you have to have rights-of-way across public land in order to facilitate economic development of the area. I am not unsympathetic to that.

But let's put something on the table to deal with that particular phenomenon rather than this sort of process from 1866 that happened to be around. There may be something that suits the needs. I think we need to do a better job of rationalizing what needs to be done in terms of public lands policy as to access.

We did something like that in Alaska with ANILCA including the Title IX provision so there is an unprecedented amount of access across what I would call conservation lands. And repeal of R.S. 2477 wasn't done in a vacuum, but it hasn't been used and when we have the director here, hopefully we will be able to nudge him along.

I understand the uneasiness, but I am trying to push this towards resolution. Obviously, in doing so, I am making a lot of waves, I guess.

Ms. HJELLE. We would like to see the process focused on the relevant issues not to create any unnecessary bureaucratic procedures, but to stay focused and to allow governments some role that gives respect and deference to their reasonable decisions and allows them to continue to maintain these roads, which they already have maintained sometimes for decades in a safe condition.

Mr. VENTO. I did pay attention to your comments about the fact that if something is being adjudicated, there could be no maintenance. That is a valid point. We would all like to eliminate the administrative but not to make a court case out of every issue.

Ms. HJELLE. I think you are right. I think the vast majority of these roads should be able to be resolved without a problem. But if you have a Burr Trail. There has not been one significant change in the county's plans because the county's plans were reasonable to begin with.

Mr. VENTO. When you go to a national park, we designate and classify lands in a different way. They are not all created equal. And once we have done that designation, it is not unreasonable to expect that the Park Service and others are going to be involved in a more aggressive situation with regards to the impact of that particular road on that national park.

So I think that is the difference there. That is an atypical situation, but obviously one that has Garfield County, Utah's attention.

Mr. Hansen.

Mr. HANSEN. Thank you, Mr. Chairman. It seems like this particular hearing and these we are going to have regarding this piece of legislation are going to revolve around R.S. 2477. Seems like that is going to be the big issue and those of us from the west and who represent people from the west are aware of the sensitive nature of this.

If I may refer to the 1964 wilderness bill, I think we all should go back and read that and read all the testimony that was given in committee and on the Floor. We will find that that was pretty



strong in talking about roadless areas. And in every piece of legislation that I have argued for for 13 years, the idea is that there was a road in it and what constitutes a road.

And, frankly, some of the more radical ideas of taking care of Utah and other areas of wilderness, they are full of roads and as the past speaker of the house from the State of Utah, we used to fund to maintain Class B and Class C roads in that area. And the only way to take the construction of the 1964 wilderness bill is do away with those roads and not call them roads.

I say respectfully, in the Soviet Union, the way to get rid of crime is not to make it a crime any longer. And so if we are going to play that game, gee, we can change a lot of things around.

I take somewhat of an exception with Cynthia Shogan's statement talking about the King Top Mountain. I went out there at the request of Millard County Commissioners and we held a hearing. We flew over it in a Beechcraft and drove over it the entire day, 57 miles of roads in that area. Culverts. There is a radar station on the thing. There are buildings and mines on King Top Mountain.

And later, talking to the BLM, they said it was a stretch of the imagination as to whether that would qualify as wilderness designation. And I think the King Top Mountain is a classic example. So that one wilderness group came to me and asked me to take it off and I was asked by a previous Member of Congress to do it and then he changed his mind.

I think if there was one that should be taken off the potential wilderness list, it is King Top Mountain. I see controversy. Would you like to respond to some of the things that they said there or would you rather not. I was curious as to what your response would be knowing of your legal work concerning R.S. 2477.

Ms. HJELLE. I appreciate that opportunity, Congressman. I have already mentioned my disagreement with the representations made about the recent Garfield County litigation, vis-a-vis the Burr Trail. Rather than Garfield County claims unlimited rights, the fact of the matter is that Garfield County has asked for a very limited right to meet minimum safety standards, and BLM says that it will not and cannot grant those rights in a wilderness study area.

This is the crux of the difficulty between R.S. 2477 and any change or attempt to repeal the scope of 2477 and the argument that future rights can be granted under Title V the FLPMA. They cannot. Not where a valid wilderness area has been established.

The counties relegated to Title V applications have lost valid existing rights-of-way that exist and have lost the ability to maintain those roads to a safe standard. I can say that I am personally involved in that litigation and I disagree with the statement there.

I think I mentioned this in my earlier testimony, but let me emphasize that counties do not intend, have not intended and there is no example that I am aware of and I would like to hear an example offered of a specific instance where a county has proposed to change a two-track trail into a paved highway. These things are not on the horizon. They are not feasible. They are horror stories created to scare people. They are just not what is happening out there.

Permanently scarring the land; if there is not an existing R.S. 2477 right-of-way, there can be no county activity. The scar already exists. It is only going to be changed if there is a reason to change it for legitimate purposes.

Claims are skyrocketing. There has never been a requirement to file a R.S. 2477 claim under Federal law. I agree with the Chairman that it is laudable to finalize these and get an idea of what is out there. It is not that counties are going out and trying to create roads where none existed.

If there was an exceptional case of this, it would be an exceptional case. I have never witnessed it. And I have talked to many county commissioners. But the counties are recognizing that there is a threat to their roads that exist and they want to protect those. That is where the claims are coming from. This is an already granted right, so it is not a question of blocking access or not.

I disagree strongly with the statements that the Hodel policy is inconsistent with prior Federal law. That policy is a very general statement, and in my experience with counties, it is being interpreted by BLM to regulate and limit what counties can do.

The Federal Government under FLPMA has regulatory power and it is exercising that regulatory power. Different people may agree or disagree about how it is being done but the power is there. And rather than changing the legislation, I think a better way to handle it is to take a look at how that is being done within the administrative agency and to make sure they are doing their job right.

The assertion of a claim doesn't constitute its validation. When you hear the assertion of railroad tracks and other things, these are not encompassed in the granted rights. People are trying to scare you with unsupported notions of what might happen under R.S. 2477. None of these things can happen. It is a grant for a road and the Federal law has held that it can't be used for anything else and so it is not going to be. If it is not legitimate, I don't think it is going to be a threat.

I think that an interesting, fundamental issue here is where is this controversy coming from? I don't believe it is coming from counties trying to change or defeat Federal policies. I think it is coming from people realizing that there is access now to public lands that might be cut off and if it can be cut off, that is what they would like to see happen. And that is what Utah's counties are opposed to.

Mr. HANSEN. Thank you. I would like to mention something that has come up because I represented that area for 10 years and that is the Burr Trail. Years ago, when William Penn Mott was the director the Park Service, we picked him up in Salt Lake and flew down to Escalante and then we took him down to the trail. So-called trail; it is a misnomer. That is a road.

My dad used to have mines in that area. When I was a teenager, I used to drive a Jeep down that particular area. I have flown over that as a private pilot and seen 18 wheelers go down that thing many times. But I was interested in the reaction of Mr. Mott. He said, "Hell, Jim, this is just a big road." He said, "Where is this trail?"



He was of the opinion that we were looking at the Bright Angel Trail in Grand Canyon and of course the way it was sold here was that the tractors were going to be carving a new trail down the Grand Canyon. I don't think people realized that Lake Powell is such a magnet. It is gorgeous and people come from all areas.

We first started going from Kanab. We ruined our cars doing it that way. Then from Hanksville to Bull Frog and we ruined our rigs because that was such a horrible road. Finally, this is just another way in. It is kind of like 66 coming into Washington. It is the straightest way to get into the greatest attraction, Lake Powell. It is the third or fourth visitation on the list for people to get there. Here is another spoke into the hub which has been a road for a long time.

Anyway, Mr. Mott looked at it. We walked the Mealy Twist, which is the most precarious area. I think you could do a road race down it, it is so well taken care of, and what we have now is a dust bowl. So he came up with a way of doing it by putting Six Mile Canyon in gravel. And he called me and Jake Garn and Orrin Hatch and said, I think we will work something out. I think my environmental friends made a mistake on that.

That is another road to Powell, which to me would be a very good thing, and keep away from some of the other roads where they are ruining some of those roads going into some of those beautiful areas. Not to give you my interpretation, Mr. Chairman. I know you are going to rebut me.

Mr. VENTO. No, I won't rebut you. I try to avoid that. But I did drive that trail as well, and I can tell you, if one 18-wheeler were on it, there better not be one coming the other way. It couldn't get by. I guess it is possible for an 18-wheeler to go up the switch back.

Mr. HANSEN. They have to back up.

Mr. VENTO. But obviously it was at least pretty unimproved. I don't know what they have done since then.

Mr. LaRocco, any questions?

Mr. LAROCOCO. Thank you. I would like to ask unanimous consent that comments regarding H.S. 1603 from Icaho's Save Our Access and Rights of Way group be made part of the official record and I have those here.

Mr. VENTO. Without objection, so ordered. All the statements of the witnesses and the members will be made a part of the record. Without objection, so ordered.

[The information follows:]

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53 MAY 17 AM 11:10

LARRY ECHOHAWK  
WASHINGTON DC 20515

## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL  
BOISE 83720-1000LARRY ECHOHAWK  
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May 14, 1993

The Honorable Larry LaRocco  
1117 Longworth House Office Bldg.  
Washington D.C. 10515

ATTN: Robin Hartman

Dear Congressman LaRocco:

I have been requested by Craig Shuler who is a member of S.O.A.R. (Save Our Access and Rights-of-Way) to submit to you the attached information in hopes that you will expedite its delivery to the committee hearing on H.R. 1603, so their concerns may be made known at the time this bill is discussed.

For your information, the Office of the Attorney General, with the assistance of S.O.A.R., Idaho Highway Districts Association and the Idaho Association of Counties, drafted a bill which passed this last session of the Idaho Legislature, S.B. 1108, Public Rights-of-Way. During the same session a bill which was introduced through the House Transportation Committee, chaired by Rep. JoAn Wood, passed and was signed into law by the Governor. This was H.B. 388, having to do with Rights-of-Way established by U.S. Revised Statute 2477. Copies of these bills are enclosed.

If you have any questions regarding any of this, please feel free to contact me.

Thank you for your assistance.

Very truly yours,

*Vivian Klein*  
Vivian Klein, Special Assistant  
Legislative and Public Affairs

enclosures  
cc: Craig Shuler

MAY-11-1993 12:23 FROM SHULER FORD INC.

TO

1028813342690 P.02



SAVE OUR ACCESS AND RIGHTS OF WAY  
P.O. Box 519 Soda Springs, ID 83276

Vivian:

The following are SQAR's comments concerning H.R.1803.

The Time Frame as listed on page 11 lines 13 & 14 is too short and unrealistic in light of the amount of work that the bill requires. To do the work that is required would probably take 10 plus years. Further, there should be provisions in the bill which would allow the states the expenditures to finance such a road study.

The publication requirement on page 12 line 12 should not be required. Submission of the claim to the proper office should be sufficient for the BLM to initiate an investigation.

In addition there is no need to have the claimant submit all the information indicated in as much as the BLM will be required to make an official investigation and would have to gather the same information all over again, thus duplicating the research work.

The documentation required on page 11 line 21 to page 12 line 14 is impossible to meet in the allotted time frame. In addition the publication costs are prohibitive to the private individual or non-profit organization. Even if it was possible to meet the costs there is no assurance that the information will be accepted by those who have the authority for review, in which case all of the expenditure would be lost.

Failure to meet the required dates and submit the required information as stated on page 12 lines 15 & 22 constitutes abandonment. Under the specified time frame this is unacceptable. This time period should be extended several years as it is impossible to do what the bill requires in the amount of time specified.

Recordation, page 12 line 23, should be proof of validity until such time as it is proved that the claim is not valid.

Under appeals, page 18 lines 18 - 20, the investigating officer has too much authority. If in the investigation this person has a bias against the claim or the claimant he can slant a report so as to make the claim invalid and thus force the claimant to make a costly appeal. Prior to a decision the claim should be heard by no less than an administrative judge before the claimant has to resort to an appeal. Additionally, we feel a judge that is elected by the people to be more appropriate in the matter of public road ways. We think this is provided for under disputes (see page 15 line 11) but not to the investigating officers determination.

*Working for the restoration, maintenance and perpetuation of public access to public land*

TOTAL P.02

Mr. LAROCO. Thank you. I wanted to direct a question of my Secretary of State, Mr. Cenarrusa. The Chairman has asked about the deadline that we have got and the bill's deadline has been the same and it has been incorporated in the bill. I think what we are looking for in the subcommittee, and what I would look for from any member of the panel here, is a date—a 2-year date, 1-year date, 3-year date, 4-year date, whatever.

That is the purpose of the panel, to hear when that might be moved. If it is tight, and that is your concern, which I share, Pete, if you could give us some idea now or later, that would be helpful.

I would just rephrase the Chairman's question, can you help us out on that. Two years, 3 years?

Mr. CENARRUSA. Thank you. Our group suggested a period of 3 years. One group suggested a period of 10 years, but we feel 3 years would be adequate.

Mr. LAROCO. That would be adequate.

And, Ms. Hjelle, do you have any thoughts on the deadline issue?

Ms. HJELLE. I do. I think that given the fact that the roads have been in existence for 110 years prior to FLPMA, a minimum of 5 years and 10 years would be better.

Mr. LAROCO. Mr. Simon?

Mr. SIMON. I guess my view would be 127 years is about enough.

Nevertheless, I would say that some extension of that, to meet difficult deadlines, might be merited. However, I think that should only be done if the bill would clearly tighten up language to make sure that all the evidence and documents presented to the Federal agency, basically, prove the case, be incontrovertible evidence of proving the rights-of-way. And I think those two things, hand in hand, would tighten things up.

I believe that Ms. Hjelle has said that a lot of these rights-of-ways simply will not qualify under the strict interpretation of the statute and the burden should be on the claimants to prove that. If they need a little bit of extra time to do that, fine.

But I think there has been time enough.

Mr. LAROCO. Ms. Shogan.

Ms. SHOGAN. I would agree with Mr. Simon. I think there is plenty of time. These rights-of-way existed before 1976, and the counties and the State of Alaska should have known what the claims were. And it shouldn't be that burdensome for them to come forward with that.

Mr. LAROCO. Pete, I would like to give you the opportunity, because of your position, to articulate any other feeling that you have as to why this is a States' right issue and what thoughts and guidance you might share with the Committee on that part of it, because we are dealing with it from the Federal standpoint.

You are a member of the State Land Board, and you are an advocate for States' rights issues. Do you have any further thoughts on that that you would like to share with the committee?

Mr. CENARRUSA. Thank you. We feel it is a States' rights issue, and highways and roads are a States' rights issue.

So I realize that Congress can pass certain legislation that might affect highways and roads within the State, such as they may put on the fact that the speed limit shall be 55 miles per hour or 60,



perhaps, or whatever; and if that isn't followed, then the Federal funds will be withheld.

Or if those riding motorcycles do not wear helmets, then the Federal funds can be withheld.

So Congress does have that capability. But otherwise, the whole road issue and highways issue should be a States' rights issue.

Mr. LAROCO. Ms. Hjella, you had mentioned that counties see a threat to the roads system. Could you elaborate on that, why you see it is a threat to the roads?

I am taking that a bit out of context. You had said it in your last statement to the Chairman.

Ms. HJELLE. What I think is happening, as a practical matter, is that, whereas up to now, the roads had been managed in an orderly fashion, when counties now propose to do anything on their roads, they are met with a combination of bureaucratic quagmire and possible litigation by those that don't want to see a given road developed for whatever reason.

And those reasons usually have to do with protection of the environment, which is fine. But they don't take into account other interests that might be important as well, such as economic or health or safety reasons.

And so one of the ways that this legislation is a threat is roads being tied up, as I indicated, for long periods of time in an appeals process during which time period there is no opportunity for safe maintenance or whatever.

Another threat here is the statute, as I understand it and read it, says that after its passage, no change whatsoever in the alignment, scope, or use of the road shall be authorized without a Title V. So if I am reading that correctly, it puts a very narrow crimp on the management of these roads, and that is what the people to my left have indicated that they want. They want these rights cut off.

The law, as it stands right now in Utah, is that the holder of one of these rights has the right to maintain the road for the purpose to which it is legitimately put; those purposes which had already been used prior to its repeal in 1976, whatever is reasonable and necessary. So that is a very limited standard. They can't do it if it is not reasonable or not necessary. And BLM has the authority to regulate those uses so that they do not cause any unnecessary or undue degradation to the public lands.

So you have a very nice boundary right now. A county government must act reasonably and say: Is this reasonable or necessary? If not, they cannot do it. And the BLM can say: This is not necessary, or it is not reasonable; and you can't do it. But this legislation would say: Any change, regardless of the reason, requires you to go to BLM and obtain a FLPMA permit, if I am interpreting it correctly. And that process steps up NEPA compliance issues.

And what has happened, historically, is that people who do not want to see the roads developed intervene in the cases and tie them up in litigation or in bureaucratic procedures for years.

So this is a nightmare in terms of expensive costs. And also is, as I interpret the statute, a loss in the scope of the rights already granted.

Mr. LAROCO. Thank you for that interpretation, and that is helpful to the committee and me coming from a public lands State. And I will review that and take a look at it.

Just as a follow-up on my final question here—time is running out—I want to give Mr. Simon an opportunity to respond to that, or Ms. Shogan.

And what I guess I want to look at is whether you see the threat as such. And I welcome your comments.

Mr. SIMON. Thank you, Congressman. I want to make a couple of points.

First of all, I have heard discussion this morning about counties not being able to use their roads; t-h-e-i-r roads. That is not established at all in fact.

What R.S. 2477 did was grant, not title, but certain use rights to these roads, very few of them which have been validated. So the fact that there may be any delays or holdups about use of some of these issues or planning decisions on some of these roads, I think, puts the cart well before the horse, when the vast majority of these claims have not been certified or validated under the statute.

And I think that is what we have to go back to and why we need some clarification that this legislation does take us back closer to the true, plain meaning of the statute.

Mr. LAROCO. Ms. Shogan, any comments?

Ms. SHOGAN. I have a number, but just one now.

We don't disagree that there are valid rights-of-way out there. There are 10 of them acknowledged in the State of Utah. What we are advocating is that when R.S. 2477 was repealed, that the scope and the alignment should be what it was in 1976. What you are saying is that you should not take that acknowledged right-of-way now and try to expand it into a WSA or other sensitive or critical areas.

And this leads into the next point which Dave and I both stressed. It is important that the Bureau of Land Management and other Federal agencies be able to regulate the use and scope of these rights-of-way.

Mr. SIMON. There has been discussion about whether the threats are perceived or the threats are real. I just want to bring up one example. It is a long way from your own State of Idaho. But in 1985, the Lieutenant Governor of Alaska stated that it was his State's intent to make the State road system—to make the map of Alaska—look like a plate of spaghetti. That is the kind of thing that makes us nervous.

And just most recently the State has got a very public intent to build a road into Denali National Park.

Mr. LAROCO. Mr. Chairman, I hope that Idaho doesn't look like a bowl of pasta. And I yield back the balance of my time.

Mr. VENTO. Mr. Hansen?

Mr. HANSEN. I would like the statement of John B. Coghill, the Lieutenant Governor of the State of Alaska, to be submitted for the record.

Mr. VENTO. Without objection.

[The information follows:]

STATEMENT OF  
LT. GOVERNOR JOHN B. COGHILL  
ON BEHALF OF THE STATE OF ALASKA  
TO THE  
SUBCOMMITTEE ON NATIONAL PARKS, FORESTS AND PUBLIC LANDS  
OF THE  
HOUSE NATURAL RESOURCES COMMITTEE  
ON  
HR 1603, RE AUTHORIZATION OF THE BLM  
MAY 25, 1993

Mr. Chairman, on behalf of myself and Governor Walter Hickel, I thank you for the opportunity to provide testimony to the Committee on the subject of the re authorization of the Bureau of Land Management.

My remarks, which follow, speak to issues of great concern to the State of Alaska in the bill as now written. Our concern focuses on Section 14, Claimed Rights-of-way, Section 8, Management of Lands and Public Participation and Section 19, National Conservation Areas. For your consideration I have also attached to my testimony the Governor's letter to Chairman Miller regarding HR 1096 of the 102nd Congress, the Governor's comments to the BLM draft report on RS 2477 rights-of-way, and a document entitled "BRIEFING PAPER, RS 2477 RIGHTS-OF-WAY." I ask that these also be entered into the record.

In 1866, ten months before the territory of Alaska was purchased from the Russians, Congress passed the law which stated "*The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.*" This law remained in effect for 110 years. During only the last 17 of these years was the State of Alaska in existence.

The State of Alaska has spoken on many occasions of the importance of these rights-of-way to our transportation infrastructure. Now these property rights are threatened by provisions of this bill. I speak here of the importance of protecting and preserving these rights-of-way.

The provision of this bill which seeks to establish a Federal Administrative review process is at best unnecessary. At its worst it creates significant legal, funding and policy issues for the federal government and the State of Alaska and its boroughs, cities and individual citizens. The 1866 law which became Revised Statute 2477 (RS 2477) granted property rights based upon public use and by dedication of rights-of-way by state or local authority. Now Section 14 of this bill challenges each and every right created during the tenure of this law, and requires



the holder of the right-of-way to defend that property against a new federal government process.

Defenders of rights-of-way must come up with the resources to present to the Federal Government, prior to January 2, 1994, a defense against the suggestion of invalidity of that right. This is a very short seven month time frame.

I suggest that neither the Federal Government, nor those forced to defend their rights, need to or should have to afford this process. In some instances, under this process, vested rights will be lost merely because the holder lacks the means or knowledge to assert them.

Especially in context of this kind of proposal, it is important to note that RS 2477 rights-of-way have been and continue to be used in Alaska without significant impact to the environment.

The opportunity to challenge the existence of RS 2477 rights-of-way is already well provided for by State law and regulation. Owners of land underlying and adjoining RS 2477 rights-of-way have common law and other remedies in existing law to protect their property from improper or unreasonable use.

Regulations on the books in the State of Alaska provide a thorough public process by which the validity of a right-of-way can be challenged. These regulations reflect the long-standing criteria recognized by the executive and judicial branches of government for the acceptance of the grant. These regulations are consistent with the 1988 Interior Department policy on the subject of RS 2477 rights of way. The Federal Government, and the states alike, have agreed that the recognition of acceptance of an RS 2477 grant was a matter of State Law, requiring no Federal action or endorsement.

The rights created under RS 2477 are property rights, not mere licenses, and are not revocable. Neither can these rights be replaced by rights-of-way regimes which were created subsequent to the repeal of RS 2477, and which were designed to supplement, not replace, RS 2477 rights. The rights-of-way process created in Title XI of the Alaska National Interest Lands Conservation Act (ANILCA), for example, is so cumbersome and onerous that none have ever been issued. If property rights are changed, restricted or lost, either during this process, or by means of it, there is the very real danger that a taking, requiring compensation, may occur.

Alaska is unique in its expanse and in its ruggedness. RS 2477 rights-of-way, similarly, were created in unique fashion across challenging terrain.



Alaska's pioneers created these routes as they made way across Alaska on foot, on horseback, by dogsled and by wagon. Air travel, of course, revolutionized access throughout the State of Alaska and has kept road development pressures down. Perhaps to a country largely accustomed to the standards of interstate freeway construction, many of our RS 2477 routes seem primitive. Many of these routes, however, provide the only way on ground from there to here. Despite the ruggedness of some of them, and the availability of air travel, Alaska's RS 2477 rights-of-way remain as essential as ever to urban and rural transportation.

The State of Alaska's land selections, and those of Alaska's boroughs and cities, assumed and relied upon access using RS 2477 rights-of-way. The Alaska Statehood Act, the Alaska Native Claims Settlement Act (ANCSA) and ANILCA all transferred property from Federal ownership. Checkerboard land ownership patterns thus evolved. Throughout Alaska, large Federal holdings block access to State, local and private lands. Pre-existing rights-of way are therefore critical to contemporary access to and across properties of differing usage and ownership.

Presented in the form of a savings clause, "SEC. 320, RIGHT-OF-WAY" (sic) purports to be innocuous with respect to its impact on valid RS 2477 property rights in Alaska. Valid RS 2477 rights existed prior to the adoption of the convoluted and cumbersome right-of-way establishment provisions of ANILCA. Alaska is singled out in this language by creating a possible presumption that any development of a valid RS 2477 right-of-way is subject to the right-of-way provisions of ANILCA.

As it applies to Alaska Section 14 unnecessarily duplicates an established process, one that more properly focuses on State law and regulation. This proposed Federal process is expedient only in its most likely effect of taking rights which were properly and legally created. These takings may call into play Fifth Amendment rights. In Alaska the means already exist to challenge and validate RS 2477 rights-of-way without creating additional and needless expense, administration and legal wrangling. The State's regulations provide for public examination, and protect the public interest.

It is the State and local process that Congress intended with respect to dedication and acceptance of RS 2477 grants. It is this process we ask the Congress to continue to respect.

Section 8 of the bill, Management of Lands and Public Participation, amends existing law to direct the Secretary, in managing public lands, to take any action necessary to prevent impairment or derogation of the resources and values of adjoining conservation system units (CSU).

The State believes that the proposed Section 8 is not necessary in Alaska from an environmental perspective, and would effect an unwarranted intrusion of national park and wildlife refuge management into the multiple use regime of the Bureau of Land Management.

The Federal Land Policy and Management Act (FLPMA) already gives the BLM broad authority to protect lands under its jurisdiction. Further, in Alaska, ANILCA protects vast areas in conservation system units.

These units represent Congress' efforts to preserve entire ecosystems. Boundaries were generally drawn along hydrographic divides with a view toward creating clear separations between CSUs and adjoining lands.

Section 8, as proposed, would effectively extend CSU management practices beyond relevant boundaries, with no further scrutiny or consideration by Congress. We believe that such fundamental changes in land management practices should properly be considered by Congress.

A section new to this legislation is Section 19, National Conservation Areas. This section calls for a new nationwide study of public lands for purposes of identifying new national conservation areas. Alaska should be exempted from Section 19(b) which sets up the study requirement. Section 17 of ANCSA already required such studies in Alaska, and Congress used the recommendations from those studies in writing the provisions of ANILCA. Section 101(d) of ANILCA clearly concludes that ANILCA has identified the "proper balance" between economic, conservation and social needs, and that

" Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas has been obviated thereby."

Since Alaska has already been thoroughly studied, Congress should save the American taxpayer the cost of this duplicative effort.

Mr. Chairman, this concludes my remarks. I thank the Committee for the opportunity to put forward the concerns of the State of Alaska.

VALTER J. HICKEL  
GOVERNOR



STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JUNEAU

May 8, 1991

The Honorable George Miller  
Chairman  
House Committee on Interior and  
Insular Affairs  
1324 Longworth House Office Building  
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing to express my deep concern about proposed amendments to H.R. 1096 which would impose new and unwarranted restrictions on the assertion and use of rights-of-way created under former Revised Statute 2477.

The amendments raise significant legal, policy, and funding issues for the federal government, states, counties, and individual citizens. Accordingly, I believe that at a minimum, Committee action on RS-2477 should be postponed pending public notice and hearings.

Beyond this, we feel that the amendments are unwarranted on substantive grounds. As you know, the second amendment would require the use of Title XI of ANILCA for any construction, realignment, change in use, or modification of the scope or extent of the right-of-way created under RS-2477 in Alaska.

If this were good public policy -- and it is not -- it should be applied nationwide. Further, the Title XI process, which has not been used once since the enactment of ANILCA, is convoluted and complicated. To require the application of this provision for every change in construction, use, extent, or realignment of an RS-2477 right-of-way in Alaska would impose extreme and unnecessary burdens on the State and local governments and on private citizens.

In addition, the amendment raises important legal issues. Trails, roads, and highways accepted under RS-2477 prior to the repeal of the statute in 1976, established property rights (easements) in the affected lands. These

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easements conveyed certain rights of access which have consistently been confirmed by the courts. Accordingly, to impose the onerous procedures contained in Title XI could well constitute a taking without compensation under the Fifth Amendment.

Finally, there is simply no evidence to suggest that the existing body of law and procedure concerning RS-2477 is inadequate to protect federal interests in Alaska. Thus, I object strongly to this amendment, because it singles out my State for discriminatory treatment and because there is no justification to support its enactment.

The first amendment also contains several significant flaws. First, by requiring holders of rights-of-way to file notice and other information prior to January 1994, the amendment would impose unwarranted burdens on governments and private citizens. In most situations, the existence of rights-of-way is already well known to federal land managers and the public. In Alaska, rights-of-way under RS-2477 have generally been inventoried. This is particularly true in the case of federal conservation system units, where the appendix to each management plan lists possible rights-of-way in a specific unit.

Second, by requiring federal officials to "investigate" each assertion of an RS-2477 right-of-way, the amendment would impose expensive and unnecessary burdens on federal officials and on persons defending the assertion of a particular right-of-way. Again, there is no evidence that existing procedures are not adequate to protect federal interests. Thus, under existing law, federal officials investigate RS-2477 assertions when particular land use conflicts or other problems arise. In the vast majority of circumstances, however, there are few problems with right-of-way usage, and a blanket requirement to investigate would accomplish little.

Third, the amendment would mandate new contest procedures, replacing a regime which has worked quite well. Further, the amendment would appear to give standing to virtually every member of the general public. Current standing requirements help ensure fair and orderly administrative consideration, and we see no reason to expand them in the current circumstance.

Fourth, the amendment would provide that a particular right-of-way is invalid prior to the completion of an administrative adjudication, thereby providing the Secretary with significant discretion to deny access. Consequently, a claimant could be involved in two administrative procedures simultaneously -- a



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defense of his RS-2477 right-of-way and an application to the Secretary to continue access prior to final adjudication. In addition, the amendment would shift the burden of proof in the administrative proceeding from the Secretary to the claimant. We believe that this approach is inconsistent with the concept of an RS-2477 right-of-way as a valid property right.

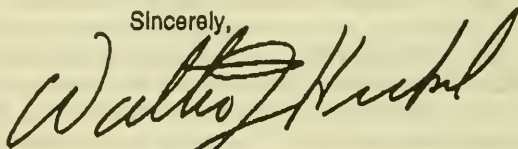
In closing, I want to reiterate my belief that the existing body of law and procedure, which has evolved over the course of more than a century, is perfectly capable of protecting the interests of all concerned, including the federal government. The changes mandated by the two amendments would, therefore, create significant burdens on non-federal parties, require substantial increases in federal appropriations, and engender confusion and needless conflict -- without improving land management in the western states.

We perceive other problems with H.R. 1096 which we will communicate separately to you and your staff.

Thank you for your consideration of my views.

With best regards.

Sincerely,

A handwritten signature in dark ink, appearing to read "Walter J. Hickel". The signature is fluid and cursive, with the first name "Walter" being the most prominent part.

Walter J. Hickel  
Governor

cc: Senator Ted Stevens  
Senator Frank Murkowski  
Congressman Don Young  
Congressman Bruce Vento  
Congressman Ron Marlenee

**STATE OF ALASKA**  
**COMMENTS TO**  
**DEPARTMENT OF INTERIOR**  
**AND**  
**BUREAU OF LAND MANAGEMENT**

**ON**  
**"DRAFT REPORT TO CONGRESS**  
**RS 2477 RIGHTS-OF-WAY"**

**APRIL 15-16, 1993**

*Contact:*

*Lieutenant Governor Jack Coghill, 465-3520*  
*Governor Walter Hickel, 465-3500*  
*Box 110015, Juneau, AK 99811*

April 15, 1993, Fairbanks, Alaska    April 16, 1993, Anchorage, Alaska

WALTER J. HICKEL  
GOVERNOR



FILED  
June 22, 1993  
69811-0001  
0071 255-7500

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
BUREAU

April 14, 1993

Mr. Ted Stephenson  
RS 2477 Project  
Bureau of Land Management  
Utah State Office  
P.O. Box 45155  
Salt Lake City, UT 84145-0155

Dear Mr. Stephenson:

*It is with interest, concern, and resolution that the State of Alaska responds to the "Draft Report to Congress, RS 2477." We respectfully submit our comments.*

*In two enclosures, we point out deficiencies in the report, including misleading statements and questionable conclusions, and support what we believe are irrefutable points of law. We also make several recommendations. Please note that although we have addressed the issues we find most critical, we have not addressed every statement in the draft report with which we disagree.*

*Alaska is a young state. Our 1958 statehood compact with the United States promised Alaska the same rights enjoyed by other states. Among those rights is the right of access, derived from openly accepted principles of common law, well-known at the time the Alaskan people voted for the terms of our statehood compact.*

*Alaskans now sense that a serious erosion of rights is occurring regarding access to and across vast areas in our state. Established RS 2477 rights-of-way are valid and valued rights that must be protected.*

*Topping the list of legal positions on which the state is resolute is that RS 2477 rights-of-way are property rights recognized by both federal and state law for 100 years. Therefore, Alaska is opposed to any administrative or legislative "taking" of RS 2477 rights, regardless of what compensation may be offered.*

Mr. Ted Stephenson

April 14, 1993

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We believe that several basic principles concerning RS 2477 need to be clearly set forth in the report to Congress:

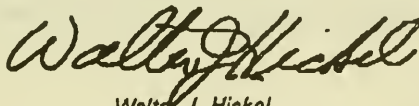
1. There is a finite number of RS 2477s grants; no RS 2477 rights-of-way could be accepted after October 21, 1976.
2. Accepted RS 2477 rights-of-way are completed conveyances that cannot be summarily extinguished without compensation for the "taking."
3. The law of the state where the RS 2477 is located has provided the criteria for the determination of the acceptance of the right-of-way under RS 2477; this principle was set forth in Department of Interior regulations as early as the 1930s.

Both of the enclosures review the report, but each treats the subject in a distinctive fashion. One is a discussion of the law, definitions, congressional intent, and costs, as the report treats or omits them. The second enclosure, written by planning, rights-of-way and transportation personnel, analyzes, questions, and refutes conclusions stated in the report. It also cites specific passages and pages in the document.

In our view, the greatest shortcoming of the report is that it lacks recommendations to the Congress, thereby denying the public, as well as the states, a meaningful opportunity to comment. Furthermore, it should place more emphasis on the official Department of Interior policy of 1988, which is a reasonable and credible foundation on which to build the future.

We look forward to the opportunity to discuss the issue with you as well as with the congressional committees which have initiated the current review of RS 2477 rights-of-way.

Sincerely,



Walter J. Hickel  
Governor



*Mr. Ted Stephenson*

*April 14, 1993*

*Page 3*

*cc: The Honorable Bruce Babbitt, Secretary of the Interior  
Pete Culp, Acting Director, Bureau of Land Management  
The Honorable Ted Stevens  
The Honorable Frank Murkowski  
The Honorable Don Young  
The Honorable George Miller, Chairman, House Natural Resource Committee  
Members, House Natural Resource Committee*

*Enclosures*

Draft Report to Congress, R.S. 2477  
Legal Discussion

I. Introduction

The draft report to Congress pertaining to R.S. 2477 rights-of-way ("ROWS") is deficient in that it mischaracterizes the nature of R.S. 2477 grants, disregards the role of state law, fails to analyze the costs and benefits of options for Congressional action, and provides no recommendations to Congress. It attempts to minimize, and ultimately ignore, the long-standing interpretations by the Department of the Interior and federal and state courts of the rights granted by the statute. The following discussion addresses each of these oversights in turn and offers specific recommendations.

II. R.S. 2477 created property rights subject to the constitutional protections of the Fifth Amendment.

As a preliminary matter, recognition of the fact that this report concerns primarily legal, rather than policy, issues is critical to provide Congress with a useful and accurate report. The draft report implies that the Department of the Interior and Congress are free to adopt policies which alter the rights obtained by the holders of these R.S. 2477 ROWs. This presents a misleading view of the law.

The provision known as R.S. 2477 granted property rights which vested in the holders of the ROWs upon acceptance of the grant. Any attempt to diminish or extinguish these vested rights would implicate the due process and takings clauses of the Fifth Amendment of the United States Constitution.

The offer made by R.S. 2477 was available for acceptance for over 100 years and, until recently, generated little controversy. The federal government and the states alike agreed the ROWs were accepted in accordance with state rather than federal law, and no action by the federal government was necessary. Beginning in 1938, the Department of the Interior's regulations formalized this statement of the law. With the passage of FLPMA, the right to accept the offer to create new ROWs was repealed. However, as the draft report recognizes, valid, existing ROWs were expressly protected.

Because they are property rights, R.S. 2477 ROWs are afforded due process protection and cannot be taken except for public purposes, and then only with the payment of just compensation. This constitutional protection is "directed against

the enforcement of an act of the legislature which attempts to authorize the seizure or destruction of property against the will of the owner. ... [It] applies to all the sovereign powers of government which may be used to interfere with the quiet enjoyment of private property." It protects state and local government property interests as well.

The taking of a ROW can also effect a taking of the property the ROW serves if access to that property is thereby cut off, entitling the owner of the accessed property, as well as the holder of the ROW, to compensation. And when a street or highway is taken and the "remaining road system is inadequate ... the cost of supplying ... substitute [access] is the measure of compensation to which [the holder] is entitled." Obviously, any attempt to extinguish valid ROWs will require compelling justification and carry a substantial cost. Similarly, overly restrictive regulation of these ROWs could result in takings and have serious impacts on the federal treasury. The final report to Congress should make these points clear.

### III. The language of R.S. 2477 defines the nature of the grant.

As the draft report recognizes, the language of R.S. 2477 defines the nature of the grant. That language must be construed as Congress intended when the provision was enacted as part of the Mining Law of 1866. The draft report summarizes, without making any recommendations, the definitions offered by various respondents for the terms "highway," "construction," and "unreserved public lands."

The federal government and the states have long accorded the term "highway" in R.S. 2477 a broad meaning. This interpretation is supported by the purpose of the statute, and the ordinary definitions of the word, both in 1866 and today. R.S. 2477 was part of a law enacted to legitimize the practices of miners and homesteaders and others in entering and making use of the public lands. The policy of the government was to encourage settlement of the western territories. The early prospectors and settlers travelled by foot, by horse, by boat, by wagon, and, in Alaska, by dogeared. The modern, multi-lane thoroughfare we know as a highway today was beyond imagining at that time.

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<sup>1</sup> 2 Julius L. Sackman, Nichols' The Law of Eminent Domain §6.01 (3rd ed. 1993).

<sup>2</sup> *Id.*, §6.11 [2].

<sup>3</sup> *Id.*, 4A Nichols', §15.2.

As the Congressional Research Service (CRS) report recognizes, the dictionaries of 1860 and 1865 defined "highway" as "a public road, a way open to all passengers." Contrary to the CRS report's conclusion, common sense suggests that Congress, in 1866, considered a footpath created and used by the public for access to and across public lands to be a highway. This interpretation is supported by other sources as well.

Black's Law Dictionary defines "highway" as "an easement acquired by the public in the use of a road or way for thoroughfare; ... a free and public roadway; ... the generic name for all kinds of public ways, whether carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries or navigable rivers." Congress and the courts, historically and today, refer to navigable rivers as "highways" for commerce, trade and travel.

Reliance on the discussion of the meaning of the term "roadless" as used by Congress in the Federal Land Policy and Management Act (FLPMA) in 1976 is misplaced. The term is used in FLPMA to identify areas suitable for study as potential additions to the National Wilderness System. A broad reading of the term roadless might preclude study of land meriting consideration. This has no bearing on what Congress meant by "highway" in 1866 when it offered the ROW grant.<sup>9</sup> Furthermore, as a general principle of statutory construction, statements by a later Congress are not reliable indicators of the intent of the earlier Congress. There is no support for an assumption that Congress, in 1866, intended a narrow, restrictive meaning for the term highway. The longstanding interpretation of the term to mean a road or way freely open for public travel, formalized in the Department's 1988 policy, is correct, and neither the executive nor legislative branches of government have power to change that meaning as a matter of policy.

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<sup>9</sup> In a 1980 Solicitor's opinion which has since been superseded by a 1988 policy formally adopted by the Department of the Interior, the Deputy Solicitor made a long leap from the definition of roadless in the legislative history of FLPMA to a requirement of mechanical construction under R.S. 2477 to avoid a perceived potential for conflict between the two statutes. As the draft report notes, the Solicitor's office chose to ignore both state and federal case law in this opinion. There is no legal justification for construing away a right to a ROW for a public way because it does not meet the suggested requirements for a road which would disqualify an area from wilderness study, especially when those requirements are gleaned from a committee report rather than the statute itself.



As with "highway," the meaning of the word "construction" in R.S. 2477 has generated differences of opinion. And, as noted above, the view pressed by the CRS Report is overly narrow. It is premised on the mischaracterization of "highway" as meaning a modern thoroughfare, and borrows from the legislative history of a statute enacted 110 years later to require mechanized construction. The Congress of 1976 and the Congress of 1866 were operating on different sets of facts, with different goals. FLPMA's legislative history is simply irrelevant to the meaning of R.S. 2477.

To postulate that the 1866 Congress contemplated mechanized construction as a prerequisite for creating legal access across the vast new western lands of this country is illogical. Most of the early pioneers had neither the means, the time, nor the need for mechanized construction. R.S. 2477 must be interpreted in light of the conditions then existing. Again, the Department's 1988 policy takes a realistic and prudent view of what is meant by the term "construction." It is consistent with the interpretation adopted by state and federal courts. To change these definitions now would impair vested rights explicitly protected by FLPMA, as well as by the Constitution.

IV. The draft report fails to analyze the costs and benefits of the options presented.

The draft report fails to analyze the costs and benefits of the options presented. Such an analysis is essential for a meaningful discussion of the options and formulation of alternatives. The costs can be divided into 3 broad categories.

The first category is takings claims. These claims will arise if Congress or the executive branch fails to recognize valid ROWs or attempts to regulate them too narrowly. It cannot be overstated that R.S. 2477 ROWs are valid existing rights, the holders of which must either be protected or compensated.

The second category of costs is litigation costs. Takings claims would generate substantial litigation costs in addition to the amounts required as compensation. Trials, particularly those requiring inquiry into factual issues and long past events, are expensive and time-consuming. In addition, any option which ignores the legitimate role of state law and over 100 years of legal precedent will add significantly to both the volume and the expense of the resulting litigation.

Third, different courses of action will have varying administrative costs. For example, adoption of a cumbersome

federal validation system would generate substantial costs for processing claims. The process set out in H.R. 1096 requires publication of notice, investigation by the agency, adjudicatory hearings, and appeals to the Secretary. These procedures are labor intensive and expensive. Compressed timelines such as those proposed in H.R. 1096 would cause a flood of assertions, diverting scarce resources from other essential tasks. The final report to Congress must examine the impact of the various options on the state and federal treasuries and on the financial resources of the citizens who will be affected.

Sweeping changes in the recognition and administration of R.S. 2477 ROWs are unnecessary and ill advised, from both a legal and a policy standpoint. Legally, Congress and the executive branch are constrained by the inescapable fact that these ROWs are vested rights, protected even without FLPMA's savings clauses. As a matter of policy, changing the rules at this late date will be costly, time-consuming, and without justification.

#### V. Alaska is unique.

Alaska's unique circumstances make R.S. 2477 ROWs an integral part of the state's transportation network. Alaska is vast, containing one-fifth of the nation's land. Our transportation infrastructure is in its infancy and costly to enhance. Prior to statehood, the Territory of Alaska encountered difficulty in obtaining funding to construct roads. Nearly two-thirds of Alaska will remain in federal ownership, with large blocks in conservation system units. Large holdings by Native corporations also contribute to a checkerboard pattern of land ownership which makes access difficult.

Continued access to and across land now in private hands or in conservation system units is essential to both development and conservation in Alaska. Because Alaska is a young state, formal recognition of many access routes has not yet occurred. Any statute of limitations provision must take this into account and allow a sufficient period of time to protect the public's rights. A minimum of 20 years would be necessary for R.S. 2477 assertions to occur in an orderly and thoughtful manner.

Although several statutes applicable to Alaska address access, there are no viable alternatives to R.S. 2477 ROWs in Alaska. As the draft report recognizes, easements reserved pursuant to §17(b) of the Alaska Native Claims Settlement Act are insufficient. They are only reserved across Native lands for limited purposes and are subject to cancellation under certain circumstances. The ROW provisions in Title XI of the Alaska National Interest Lands Conservation Act are so cumbersome they

have never been used.

The draft report states that Congress could cancel all R.S. 2477 ROWs and replace them with ROWs issued pursuant to FLPMA. This suggestion ignores the very substantial takings implications of such a course of action. ROWs under FLPMA are an entirely different species of property interest from the rights granted by R.S. 2477. FLPMA ROWs are subject to substantial secretarial discretion and regulation which are inapplicable to R.S. 2477s. Annual rental at fair market value can be charged for FLPMA ROWs. The secretary can set the duration, terms and conditions, and uses of a FLPMA ROW. FLPMA ROWs are only available on public lands and National Forests, not parks, refuges or monuments. Congress simply cannot substitute one for the other.

#### VI. Recommendations.

The draft report fails to make recommendations to Congress. As a result, interested and affected parties are denied any meaningful opportunity to comment on specific recommendations before they are forwarded to Congress. However, there are several recommendations that should be made.

First, the final report should recommend formalizing 100 years of public land law. Adjudication of rights under R.S. 2477 should continue to occur in state forums, according to state law. Second, it should recognize that the 1988 Department of the Interior policy contains workable standards that could be adopted as minimum federal standards to which states could be subject. Third, it should recommend that Congress consider enacting a limited waiver of sovereign immunity, similar to the McCarran Amendment for adjudication of water rights, to allow the federal government to participate in the R.S. 2477 adjudication process without disrupting state property rights.

Finally, it should specifically recognize state procedures. The regulations recently adopted by Alaska and provided with our earlier comments contain a fair method for determining the validity of R.S. 2477 claims. They require documentation, public notice, evaluation, and adjudication if warranted, of ROW claims. Under a state oriented procedure, coupled with a waiver of sovereign immunity to permit the federal government to participate in validity determinations, a statute of limitations would be unnecessary. This would be the most cost-effective alternative for the federal government, both in terms of administrative costs and liability.

AN ANALYSIS OF THE "REPORT"  
by Personnel in State of Alaska's  
Planning, Rights-of-way, Highway Construction

ALASKA POSITION

RS 2477s are existing rights which can not be changed or modified unilaterally.

In 1988 the State of Alaska worked with the Department of Interior (DOI) to develop a policy statement on RS 2477 so that some general areas of agreement could be established. Although we did not agree totally with the DOI policy as it was finally adopted, at least we were satisfied that an attempt had been made in good faith to work with affected parties to clarify the issues. We consider the 1988 policy statement to be the federal position on RS 2477 and suggest that unilateral revisions are inappropriate in light of the extensive cooperative effort that went into its development.

STATEHOOD COMPACT

A major part of the statehood debate concerned how the proposed State of Alaska would develop an economy so that it would not be a drain on the federal treasury and could enjoy equal status with other states. In order for the new state (Alaska) to enter the Union on equal footing with other states, Congress increased the land available for selection so that an economy could be developed through resource development on the land received.

Subsequent federal withdrawals and federal management decisions have made access to these lands for resource development problematic. In addition, access has been denied or diminished. We have not entered the union on equal footing. Some of the basic agreements concerning statehood now hinge on whether adequate access exists across federal lands.

The fundamental issue facing Alaska is the continuing pattern by the federal government of limiting access to our land and resources. RS 2477s are a critical part of Alaska's access options.

ALASKA'S INTENT

Alaska's intent to protect its RS 2477 rights is not an indication that improvements of these rights-of-way, or even regular maintenance, are imminent. Some rights-of-way will be of value in providing access to state resources, communities and land. Others continue to be used as they have in the past. Some may not be used



at all or may be developed for something as benign as a hiking trail. It is incorrect to assume that protection of these existing rights makes future improvement automatic.

REPLACE RS 2477 RIGHTS WITH FLPMA  
AND ANILCA RIGHTS-OF-WAY?

The draft report conveys a message that RS 2477 rights-of-way could be replaced with permitted FLPMA rights-of-way.

FLPMA rights-of-way are not an acceptable substitute for existing RS 2477 rights-of-way. They are subject to substantial secretarial discretion including duration, terms, conditions, rental, use limitations and revocability.

Such a conversion would categorically change the nature of the RS 2477 right-of-way from what was established over time through court decisions and administrative agreements to one where the nature of right-of-way could be unilaterally determined by federal land managers. On the face of it, this option is not acceptable and any attempt to impose such a conversion would be viewed as a taking of valued property.

The report also lists Title XI of ANILCA as an Alaskan alternative to RS 2477. As the report correctly points out, Title XI is a process, NOT an authority. This alternative is not viewed as a viable option in Alaska. Title XI decisions are based totally on compatibility with unit management and do not take into account the merits of a project. Also, if wilderness or National Park Service managed land is involved, most rights-of-way specifically take an act of Congress.

Title XI requires extensive and costly up-front work to be completed prior to a compatibility determination by federal agencies. Potential project developers must gamble on whether access will be approved. There are few investors who would willingly develop a project where such high up-front costs and risks are involved. An example follows:

In November of 1983 Cominco Alaska filed an application under Title XI for a transportation utility corridor across Cape Krusenstern National Monument, a unit of the National Park System in Northwest Alaska. The land they were attempting to access with the corridor was the Red Dog ore body, a world class mineral deposit only 55 miles inland. Yet, despite the merits of the project Cominco abandoned the Title XI process because there were too many access uncertainties associated with it. As a measure of the level of frustration they experienced with the process, it is instructive to note that they abandoned the process in favor of a land trade negotiated with Congress. Alaska does not expect future Title XI exercises to be less cumbersome or more successful.

Page specific comments

The report contains many questionable and misleading statements. The following comments address a few of them.

## Page 15

Addressee the possibility of "statute of limitations". In 1985 BLM wrote Alaska (BLM district manager to Alaska Department of Transportation) that there is no statute of limitations on assertions. It has been Alaska's practice, and is still Alaska's position, that the 1985 BLM information is valid.

## Page 16

The first paragraph: The report should point out that federal action in the past has deferred to local and state actions and policies. Access has been enjoyed for decades over some RS 2477 rights-of-way. Federal resources have gone into improvement of many of these routes.

## Page 21

This page notes twice that in FLPMA Congress made it clear that valid, existing rights are protected. The same is true in ANILCA. The report should consistently indicate that contemporary land management decisions are subject to valid existing RS 2477 rights-of-way.

## Pages 22-23

This section indicates that Title XI of ANILCA offers adequate rights-of-way in Alaska and then presumes why the process has not been used. That the process is expensive and cumbersome is an understatement. See previous comments under REPLACE RS 2477 RIGHTS WITH FLPMA AND ANILCA RIGHTS-OF-WAY (p. 2, Attachment B)

## Page 27

The last paragraph states "...if the road was constructed by or for the federal government...it would not qualify as an RS 2477 highway." This statement is erroneous. As stated, it would appear that anything built by the Alaska Road Commission or the Bureau of Public Roads would not qualify. This is contrary to the 1988 DOI policy and contrary to more than 100 years of state and federal law.

## Page 43

Page 43 refers to "...indefinite recognition of future RS 2477 rights-of-way...". This verbiage is incorrect and misleading. The Report should send these messages: (1) there is a finite number of RS 2477's. (2) There will not be any future RS 2477's. (3) RS 2477 rights-of-way either exist as of 1976 or they do not exist. (4) RS 2477 rights-of-way are valid, existing rights to which subsequent actions are subject.

## Pages 53-60

Many of the constituency concerns included on these pages should be incorporated throughout the Report rather than relegated to the last several pages. These comments that recognize valid existing rights and more than 100 years of existing state and federal law support Alaska's position. We believe they should have more prominent placement in the Report.

## Page 65

Alternative 5: While the language is unclear, the discussion of the "Alaska Alternative" implies that unconstructed section line dedications are not valid. The State of Alaska and the federal government disagree on this point.

## Pages 66 and 69

Tables are misleading and over simplify issues. To say that under any of the restrictive proposals there would be no taking is presenting only one perspective on a polarized situation. The same is true of the conclusion that there would be "no impact" on access to federal land. This is especially important since people may be inclined to study only the tables in lieu of reading the entire Report.

## Pages 65 and 68

These pages discuss the possibility of an RS 2477 assertion "sunset" provision. The State of Alaska does not support a "sunset" provision for RS 2477 rights-of-way. If a "sunset" provision on assertion is imposed, it must allow a sufficient period of time to protect the public's rights.

More General Comments

The discussion of "casual use" scattered throughout the Report adds little. It should be made clear that "casual use" is not assured and cannot serve most needs relevant to RS 2477.

Any administrative or legislated "taking" of RS 2477 rights is not acceptable to the State of Alaska.

Alaska has a validation process in place. The Department of Interior should recognize that process and consider deferring to the State.

The Report offers no recommendations. The State of Alaska makes recommendations (above and in Attachment A) and requests to be part of the recommendation and decision making process. The directive from Congress (to compile the Report) is specific when it requests "...sound recommendations for assessing the validity of claims to result from this study..."

CONCLUSION

A discussion and analysis of the entire Report would take many pages of detailed verbiage. Participation in all future deliberations is requested by the State of Alaska.

We emphasize that the State considers the RS 2477 issue as a precious legal right or legal grant. The State does not consider RS 2477 to be a "policy" matter that can be molded, whittled down, or rewritten by bureaucrats.

The Report implies "policy" throughout; that implication is incorrect.

The purpose of the DOI report is to gather information and public input on the RS 2477 issue. The mandate for this Report emphasized gathering information from the affected states and presenting it to Congress. It is inappropriate for the DOI Report to "parrot" the Congressional Research Service report. The State has identified serious legal and policy problems with the content of the CRS report. These problems need to be resolved. The CRS report should not be relied on extensively as a resource document. We recommend that the DOI report be reorganized to emphasize input from western public lands states and other affected interests.



BRIEFING PAPER  
R.S. 2477 RIGHTS OF WAY

HISTORY AND ISSUE:

Congress enacted, in 1866, a grant of rights of way for the "construction of highways" over unreserved public lands. The grant was enacted as Section 8 of the Mining Act of 1866, and later became Section 2477 of the Revised Statutes (R.S. 2477). The enactment in 1976 of the Federal Land Policy and Management Act (FLPMA) repealed this section but protected valid existing rights.

*"And be it further enacted, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."*

The majority of the United States' western states are founded on property acquired by the Federal Government subsequent to this country's establishment. In the late 1800's the western territories, now the "public lands" states, were still largely unsettled. To encourage settlement and development of the land, and to resolve substantial concerns regarding trespass on Federal property, the Federal Government enacted R.S. 2477. The provision guaranteed that access across the territories, and to inholdings, would be provided as the land remained Federal property, or was transferred to state or private ownership. Because the characteristics of usage and conflict resolution differed so greatly between what is now North Dakota and California, state and local law was left to provide the details regarding the terms of and acceptance of the grant. Under this authority, rights of way were still being created, and thereby granted, under R.S. 2477 until its repeal by FLPMA in 1976. In turn, FLPMA established new procedures for the creation of new rights of way. To this day R.S. 2477 rights of way, some developed into major highways and others still horse or dogsled trails, provide vital means of access across Federal, State and private properties.

It is not disputed that R.S. 2477 rights of way, and the confidence placed on the durability of access they provide, played a significant role in the exploration, settlement and social, economic and political development of the West. R.S. 2477 rights of way are an issue now due to recent efforts in Congress to enact legislation which would require each right of way to

be called into question and Federally validated. Prompting the legislation are interests critical of the lack of uniformity among local validation processes, contention over the definition of 'highway', and 'construction', as they apply to those processes, and the belief that rights of way created since FLPMA will be asserted in those same processes. Three separate efforts to pass this legislation in the 102nd Congress have failed, but language was enacted that required a study to be conducted on RS 2477; and a report issued by May 1993. That study is under way by the Bureau of Land Management.

#### STATE OF ALASKA'S VIEW:

Most of Alaska's great expanse is Federal property, and was settled profoundly with the use of and dependence upon the transportation and access grants provided by R.S. 2477. The State, local governments and private property holders all have become vested in those property rights, especially because they were relied upon in subsequent land selections, land acquisitions and property development. There exists today no satisfactory alternative to create new rights of way in Alaska. Processes created by nation-wide and Alaska specific land management legislation have served to discourage rather than encourage the development of rights of way. Because this is the case, maintenance of existing R.S. 2477 grants is especially imperative.

A recent report authored by Pamela Baldwin of the Congressional Research Service discusses the case that a federal process should be established to subsume the state processes regarding delineation and validation of R.S. 2477 rights of way. A new federal process, however, would create an additional bureaucracy and place a difficult burden of proof on those who have put confidence and reliance on existing local processes.

Congressional intent and Federal Case Law both have recognized that R.S. 2477 rights of way were a standing offer by the Federal Government, requiring only public use and acceptance. This recognition, that R.S. 2477 is a matter of state law, is affirmed by a 1988 administrative decision of the Department of the Interior.

The existing body of law and procedure, evolved over more than a century, is perfectly capable of protecting the interests of all concerned, including the Federal Government. The changes mandated by the legislation would

create significant additional burdens on non-Federal parties, require substantial increases in Federal appropriations, and engender confusion and needless conflict without improving land management in the western states. This legislative proposal is without foundation that any environmental harm is created by the proper use of valid R.S. 2477 right of ways, or that any environmental benefit will be created by application of such a Federal process.

The standard that the local law would affirm what constituted an R.S. 2477 right of way is the accepted practice. More significant is the fact that this is the standard under which State, local and Native Corporation land selections have been made, and patents applied for and perfected.

To validate its R.S. 2477 rights of way, the State of Alaska has adopted an extensive regulatory program to nominate and identify existing, valid R.S. 2477 rights of way. The regulatory process the State of Alaska has adopted provides a fair method for determining whether R.S. 2477 rights of way are valid. The regulations neither attempt nor allow the establishment of new rights of way. The State of Alaska will only affirm the irrevocable property rights established under R.S. 2477, based on documented historical use, prior to October 22, 1976. The evaluation process established in 11 AAC 51 affords everyone, federal agencies, state agencies, private property owners and members of the public, a voice and a role in each determination.

Mr. THOMAS. And Mr. Smith has a statement.

Mr. VENTO. Without objection, his statement will be put in the record.

[The information follows:]

STATEMENT OF CONGRESSMAN ROBERT F. (BOB) SMITH

Mr. Chairman, sometimes those of us on this side of the aisle feel like Bill Murray in the recent movie "Groundhog Day," which is a story of a man who was forced to live the same day over and over again.

Every Congress we have to wake up and go through the futile hearing process on a BLM reauthorization bill that will never become law. It's the same old story every Congress. The Chairman rams this bill through the House, and the Senate kills it.

Whereas "Groundhog Day" was a comedy, the bill we will be hearing today is a tragedy for those of us from states, that unlike Minnesota, have a significant amount of land owned by the BLM.

This is a buffer zone bill, plain and simple. And because this bill requires buffer zones around conservation system units, I want to review the areas in Oregon that may be impacted.

The BLM already controls over one-quarter of my state. We have 2.1 million acres of wilderness, 1,800 miles of wild and scenic rivers, 200,000 acres of National Parks, 430,000 acres of National Recreation Areas and several hundred miles of national trails.

This bill would place buffer zones around these so-called conservation system units areas. It's equivalent to drawing lines around the 10,000 lakes in Minnesota and placing them off-limits to everything. It's a not-so-very clever way to expand the federal domain and turn the BLM from a multiple-use agency into a single-use agency.

Let me talk for a moment about two other sections in this bill. This bill establishes an Organic Act for National Conservation Areas. In the two previous Congresses, I've introduced legislation to establish an NCA at Steens Mountain in eastern Oregon. The language in HR 1603 would make a Steens NCA totally unworkable. An NCA would just be a code name for a National Park.

Finally, Oregon already has the largest number of recognized RS 2477 right-of-ways. We don't want or need the proposed unfair and expensive process to investigate and adjudicate rights of way claimed under RS 2477 that is called for in this bill.

I urge this Committee to report a simple 8-line reauthorization. Going through this exercise again is not in anyone's interest.

Thank you.

Mr. THOMAS. I have a couple of questions. We have been on this issue long enough. I am a little confused. You speak of permits to use roads and so on.

Do you see a right-of-way as a property right?

Mr. SIMON. I believe the grant is for the use of the existing type of use, character of use, that is ongoing.

Mr. THOMAS. Rights-of-way, I think, are property rights, are they not, granted by the State prior to 1976?

Mr. SIMON. I don't believe they are granted by the State, Congressman.

Mr. THOMAS. By the United States.

Mr. SIMON. By the United States?

Not being a property rights lawyer, I don't want to get into deep water on this issue—

Mr. THOMAS. You used the words, permit and right-of-way, interchangeably, and it seems that there is quite a bit of difference.

Mr. SIMON. It is certainly true that none of the legal guarantees that would be afforded a local government or private claimant would kick in unless the claim has been validated.



So there is at least a point where the claim becomes something more than that.

Mr. THOMAS. Ms. Shogan, did your organization represent wilderness?

Ms. SHOGAN. Southern Utah Wilderness Alliance.

Mr. THOMAS. And you are here all the time.

Ms. SHOGAN. All the time. Unfortunately.

Mr. THOMAS. That is interesting. And your group drafted these R.S. 2477 provisions?

Ms. SHOGAN. Our three suggestion for the bill today? Yes.

Mr. THOMAS. And there seems to be some difference of view about them.

Did you consult with local governments on these?

Ms. SHOGAN. We are in daily contact with local governments. We have eight employees in the State of Utah.

Mr. THOMAS. Did you have a contact on this issue in any sort of agreement.

Ms. SHOGAN. On R.S. 2477? Daily basis.

We have been involved in the Burr Trail case for a number of years.

Mr. THOMAS. You are coming here with ideas about hopefully coming together with a solution.

Did you have any contact with anyone looking for something you might find a common interest in?

Ms. SHOGAN. We have been open to discussion for a number of years.

Mr. THOMAS. Okay. Thank you.

Mr. VENTO. The point is, you were talking about her draft of her testimony, not the bill, Mr. Thomas?

Mr. THOMAS. I am talking about the bill.

You didn't participate in the drafting of this section of the bill?

Ms. SHOGAN. No. What I said was, I drafted our three suggestions for the R.S. 2477. I had nothing to do with the bill.

Mr. VENTO. Not directly. But I thought there was maybe a little misunderstanding.

Thank you all very much for your testimony. We appreciate it.

**PANEL CONSISTING OF GEORGE LEA, PRESIDENT, PUBLIC LANDS FOUNDATION; CATHY CARLSON, LEGISLATIVE REPRESENTATIVE, PUBLIC LANDS AND ENERGY DIVISION, NATIONAL WILDLIFE FEDERATION; NANCY GREEN, DIRECTOR, BLM PROGRAM THE WILDERNESS SOCIETY; AND CONSTANCE E. BROOKS, ESQ., DENVER, CO**

Mr. VENTO. Let me ask for the next panel.

Changing places, we have George Lea, Public Lands Foundation; Ms. Cathy Carlson, National Wildlife Federation; Nancy Green, The Wilderness Society; and, finally, Ms. Connie Brooks from Denver, Colorado, a citizen, witness.

Your statements have been made a part of the record, and I would like you to summarize your statements in five minutes. And I know that is difficult, given the time that you spent on these and the work that you have given and the breadth of the bill. But, hopefully, we will get through some of the questions and be able

to focus on more of the points that you would otherwise make in a longer statement.

Mr. Lea, please proceed.

### STATEMENT OF GEORGE LEA

Mr. LEA. Thank you, Mr. Chairman.

As the national organization of retired BLM former employees, we really believe we understand what is happening to the public lands, and I want to thank you for this opportunity to appear here today and express our views on H.R. 1603 and to offer additional amendments to FLPMA.

In regard to the areas of critical environmental concern, we believe that BLM has been doing a good job in following the instructions in FLPMA; and the amendments offered here today, could, if interpreted correctly, reinforce that original language of FLPMA.

We do, however, find that the proposed wording of Section 103(a)(3) leaves the intent of the Congress unclear by stating that an ACEC may be identified to, quote, "protect or enhance the resources and values of a conservation system unit" and then goes on to state that, quote, "it is not the intent of Congress that the Secretary establish protective perimeters or buffer zones around a conservation system units," leaves a big question for us.

To establish an ACEC for the purpose of protecting the critical resource of an established conservation system unit is, in fact, establishing a protective buffer. We suggest that ACECs not be used for these purposes but for the purpose of protecting the resource values within the ACEC as originally intended by FLPMA. Where BLM lands adjoin a conservation unit, BLM should be a good neighbor and prevent any unnecessary impairment of the values of the conservation unit but not by establishing an ACEC.

Also the proposed amendments to ACECs do not overtly introduce the concept of dominate or single-use management for all ACECs. However, these amendments might be construed to do so. Many ACECs contain a mixture of resources, the management and use of which are compatible with the critical resources being protected. As a practical matter, designating specific conservation areas often is more expedience of the moment where Federal agencies and constituents struggle for turf rather than for a real concern for what is best for the natural resources involved.

Conservation areas are proposed to head off the establishment of a national park or a refuge or, in other cases, to prevent BLM from becoming a full partner in public land management as mandated by FLPMA.

The Public Lands Foundation believes that piecemealing the public lands administered by BLM is not needed to attain proper management of the land's resources. FLPMA contained all resources needed to maintain the public land as a national system similar to the national forests and refuges and parks.

We believe that H.R. 1603 should be broadened to create a national system and to give the public land a distinctive system name. We continue to suggest the name "National Resource System" as an appropriate name. This designation would be a major step toward focusing attention and support for all the BLM-administered public lands and all the national resources contained there-

in and not simply addressing some areas identified as a conservation system.

In regard to Section 6 of your bill, the professional qualifications, we are very pleased to see this clarification amendment. The adoption would correct an inadvertent result of the Civil Service Reform Act of 1978 which can be construed itself as having revised FLPMA so as to permit designation of top-level BLM positions as general positions in the Senior Executive Service, with the result that they would be open to noncareer appointees. Review of the legislative history of FLPMA makes it clear that Congress didn't intend to create the politicization of BLM leadership.

In regard to Section 18, this proposed amendment should perhaps be entitled "biological diversity." We support the concept of maintaining biological diversity of public lands; however, the wording here is very restrictive and eliminates the use of any new science which, for example, may include vegetative manipulation or the use of species that have been proven to be useful in soil protection or the establishment of a viable game species.

We simply suggest that the term "biological diversity" first be defined and further debate be held on this concept as it relates to multi-use management.

Mr. Chairman, we offer other amendments for your consideration. One of the proposals that we are making is that H.R. 1603 was to authorize BLM's program. But it has become a major legislation to amend FLPMA. The 20-year anniversary of FLPMA would be in 1996. Perhaps now is a time to consider the comprehensive evaluation of the implementation of the law, focusing on the future and thus be forward-looking.

We suggest the formation of a national panel of distinguished citizens of a nonpartisan nature to carry out such review leading to recommendations to the Secretary and to the Congress.

Mr. Chairman, I will close at this point but only to say that our statement suggests other amendments to FLPMA; make minerals and mining a full partner in the planning system; provide the authority for the Bureau to charge for the electronic records; develop a definition of ecosystem, which has become an important concept in public land management; and again repeal certain ancient laws, established in the 1800s.

Thank you, Mr. Chairman, for this opportunity and your leadership with this committee. And we hope that our views will be of help to you in your work.

Mr. VENTO. Thank you, Mr. Lea.

[Prepared statement of Mr. Lea follows:]





Public Lands Foundation

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For America's Heritage

STATEMENT BY GEORGE LEA, PUBLIC LANDS FOUNDATION ON H.R. 1603, TO AUTHORIZE APPROPRIATIONS FOR THE BUREAU OF LAND MANAGEMENT FOR FISCAL YEARS 1994 THROUGH 1997. BEFORE THE NATIONAL PARKS AND PUBLIC LANDS SUBCOMMITTEE OF THE HOUSE NATURAL RESOURCES COMMITTEE, MAY 25, 1993.

Mr. Chairman, I am George Lea, President of the Public Lands Foundation. As a national organization of retired but still dedicated former BLM employees, the Foundation has a unique body of knowledge and expertise. More importantly, we truly understand what is happening to the public lands. We thank you for this opportunity to appear here today to express our views on H.R. 1603 which would authorize appropriations for BLM programs, and propose amendments to FLPMA. We also recommend additional amendments.

### Sec. 3 FLPMA Definitions.

#### *Areas of Critical Environmental Concern*

We have no objections to the proposed amendments to Section 103. We believe BLM has been establishing ACEC's following the current FLPMA requirements and believe the proposed amendments should simply reinforce the original language of FLPMA. We do however find the proposed wording of Sec. 103(a)(3) still leaves the intent of Congress unclear. By stating that ACEC's may be identified to ... "protect or enhance the resources and values of a conservation system unit", and then to continue by stating... "but it is not the intent of Congress that the Secretary establish protective perimeters or buffers zones around conservation system units" leaves a big question. To establish an ACEC for the purpose of protecting the critical resources of an established conservation system unit is in fact establishing a protective buffer. We suggest ACEC's not be used for these purposes but for the purpose of protecting the resource values within the ACEC as originally intended by FLPMA. Where BLM lands adjoin a conservation system unit, BLM should be a "good neighbor" and prevent any unnecessary impairment of the values of that conservation unit but not by establishing an ACEC.

The proposed amendments to ACEC's do not overtly introduce the concept of dominate or single use management for all ACEC's. However these amendments might be construed to do so. Many ACEC's contain a mixture of resources, the management and use of which are compatible with the critical resources being protected. However, if not compatible those uses would be restricted or modified to protect the primary reason for the ACEC. The point being



that not all ACEC's need be segregated for all other uses of the land, only from those that are not compatible.

Specific resources to be managed are listed under definitions and in other sections of FLPMA. These create a problem in the likely omission of other important resources. We recommend that paleontological resources and wilderness resources be included.

Since passage of FLPMA in 1976, ecosystem management has become an important concept in public land management and will undoubtedly continue to be significant. This concept is not prohibited by FLPMA but it is not embraced by current law. We recommend that ecosystem and ecosystem management be defined now to eliminate confusion of the term and suggest the following definition be added to H.R. 1603:

*Ecosystem Management.* Ecosystems as used in conjunction with ecosystem management, consist of those biomes for which information exists or can reasonably and timely be developed, and are identified after public comment, as significant or important, and are then listed in the land use plan as defining the ecosystem which will be considered for management decisions with the planning area.

#### *Conservation System Unit.*

In the history of the west when settlement and development were national goals, the public lands were looked upon as a means to accomplish these goals by transferring them out of federal ownership. Later it was believed that certain lands might serve public purposes if left in federal ownership. So numerous lands were designated for national parks, forest and refuges, etc. After lengthy national debate FLPMA became the organic act for managing the remaining public lands. FLPMA established a national policy for the retention and management of the public lands eliminating the need to further segregate the land into individual areas. As a practical matter, designating specific Conservation Areas often is for expedience of the moment where federal agencies and constituents struggle over "turf" rather than a real concern for what is best for the natural resources involved. Frequently a conservation area is proposed to head off the establishment of a national park or refuge or in others cases to prevent BLM from becoming a full partner in public land management and as mandated by FLPMA.

The Public Lands Foundation believes piece-mealing the public lands administered by BLM is not needed in order to attain "proper management" of the land's resources. FLPMA provides all the principals and objectives needed to manage the public lands as a *National System* similar to the recognized systems for national forest, refuges and parks.. But FLPMA did not make this declaration even though FLPMA was originally named the National Resource Land Policy and Management Act. We believe H.R. 1603 should be broadened to create a national system and to give the public lands a distinctive system name. We continue to suggest that name be the National Resource Lands System. The public lands in the system could be further categorized or identified for management purposes under the planning and other provisions of FLPMA. These further defined areas could be predicated on the basis of ecosystems that better fit the natural and biological characteristics of the land rather than for an individual resource or politically motivated designation under an individual named conservation system

unit. This declaration of a national land system would be a major step towards focusing attention and support for the protection of all BLM administered public lands rich in wildlife, recreation, archeology, scenery, open space, and all the other natural resources and not address only some areas identified by a conservation system designation.

#### **Sec. 6. Professional Qualifications.**

We are very pleased to see this clarifying amendment. The adoption would correct an inadvertent result of the Civil Service Reform Act of 1978, which can be construed as having revised FLPMA so as to permit designation of top-level BLM positions as 'general' positions in the Senior Executive Service, with the result that they would be open to non career appointees. We believe the general public are also pleased to have this clarified. A review of the legislative history of FLPMA makes it very clear that Congress did not intend to permit the politicization of BLM leadership and expressed that policy in section 301(c) of FLPMA. Certainly it would not be in the best interest of managing the nations public resources nor of BLM as a career, professional land-management agency to allow such to occur.

#### **Sec. 8 Management of Land and Public Participation.**

##### *Advisory Councils*

Throughout our careers as BLM employees PLF members have extensive experience in working with advisory councils in management of the public lands. They can be an important component in that management. More often than not citizens are appointed to the advisory councils based upon their partisan connections rather than on their knowledge and experience with public lands and the resources involved. This can and has set up disharmony within a council making it very difficult for the councils to be effective in assisting BLM with its management responsibilities. We recommend changes to this section to clarify that advisory council members qualifications be based on their knowledge of the public land resources and their uses. The best way to accomplish this would be to simply exclude advisory committees and councils from the provisions of the Federal Advisory Committee Act.

#### **Sec. 10. Exemption From Strict Liability.**

Many of the nonprofit entities that acquire right-of-way provide commodities, i.e., water, electricity, etc., to for-profit enterprises. We feel that nonprofits should be treated the same as for profit enterprises in responsibility and liability for damage or harm to the public land and not allowed to pass these liabilities on the tax payers.

#### **Sec. 14. Claimed Rights-of way.**

We agree with the concepts in Sec. 14 concerning recordation of claimed rights-of-way under RS 2477 in order to bring finality to this open-ended issue. Final action on this section should wait until the report to Congress has been assessed. That report from BLM is due in June 1993. Our preliminary review of the draft report indicates it contains valuable information and analysis necessary to pass judgment on Sec. 14.

### **Sec. 15. Wild Horse Sanctuary Report.**

The establishment of private sanctuaries addressed in this section was a foolish idea from the beginning. Reality has set in and both the BLM and the private operators now realize this to be the case. But now this mistake is costing the tax payers dearly for the continued maintenance of a few hundred horses. One thing is for sure and that is that BLM should not add new horses to these horse farms. Our only comment on the proposed amendment is to ask that the Congress not make the reporting and waiting period so onerous as to discourage BLM from phasing these so called sanctuaries out, over time, beginning with consolidation of the existing ones to reduce costs.

### **Sec. 18. Management of Public Lands Relating to Natural Productive Capacity.**

The proposed amendment should perhaps be titled "Biological Diversity". While the Foundation supports the concept of maintaining biological diversity on the public lands, the wording here is very restrictive and eliminates the use of any new science, which for example, may include vegetative manipulation for good reason, or the use of introduced species that have been proven to be successful in soil protection or have been established as a viable game species. Other questions are raised by the wording of the amendment including the status of wild horses and burros as being a natural component of the biological diversity of the public lands. As presented this amendment may be more appropriate as a mission statement for the National Park Service. The mission of BLM as stated in FLPMA is not that of the Park Service. This Section was a provision of the 1991 BLM re authorization bill added on the House floor. We suggest the term Biological Diversity first be defined and that further debate be held on the concept.

### **Additional Amendments.**

Mr. Chairman, although the primary purpose of H.R. 1603 was to re authorize BLM programs, it has become a major legislation in amending FLPMA. The 20 year anniversary of FLPMA will be in 1996. Perhaps now is the time to consider a comprehensive evaluation of the implementation of the law focusing on the future and thus be forward looking. We suggest the formation of a national panel of distinguished citizens of a non partisan nature to carry out such a review ending with recommendations to the Secretary and the Congress.

The Public Lands Foundation suggest the following additional modifications to FLPMA that could be considered by the Committee at this time or by the above review:

### **Sec. 302 (b) [FLPMA].**

This section of the Act precludes the need for the mining industry to become a part of the land use planning process or for becoming a full participant in any ecosystem management process. We recommend the penultimate sentence of this Section be deleted.

**Sec. 304 (a).**

Public access to public records in this era of electronics is diminished for lack of system modernization and funding. The transformation of public records on to electronic retrievable storage is under way throughout BLM. Access and retrieval could be possible from any place. Funding for system modernization could be achieved through authorizing costs recovery be included in the service fees. Currently only the cost of providing copies of official public land documents is specifically authorized. We recommend an insertion into Section 304 (a) so as to read--"Notwithstanding any other provision of law, the Secretary may establish reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents *including electronic records* relating to public lands and may change and abolish such fees, charges and commissions."

**Other.**

There are several other amendments that would enhance the management of the public land and assist BLM in carrying out its mission. We have previously recommended the following :

- 1) Authorize BLM to use Knudsen-Vandenberg legislation for reforestation.
- 2) Authorize the re-direction of receipts, now going to the Bureau of Reclamation, from sale of vegetative materials from the public lands back to BLM for reforestation and other land management practices.
- 3) Authorize a reforestation trust fund from moneys received from the timber import tax.
- 4) Repeal the Desert Land Act of March 3, 1877 (19 Stat 277).
- 5) Repeal the Carey Act of August 18, 1894 (28 Stat 422).
- 6) Repeal the Indian Allotment Act of February 8, 1877 (24 Stat 389).

Mr. Chairman, we again thank you for this opportunity and your leadership and we hope our views will be of value to your committee in making changes at BLM that will advance public land management.



Mr. VENTO. And we are pleased to welcome Cathy Carlson with the National Wildlife Federation.

### STATEMENT OF CATHY CARLSON

Ms. CARLSON. Thank you. It is a pleasure to be here today. I feel a little like Mr. Synar did a couple of months ago when he was before the committee. And the biennial review of appropriations has taken on the appearance of a regular event like the annual grazing hearing.

The National Wildlife Federation appreciates the Chairman's efforts. We believe it is mainly through your efforts and those of your subcommittee staff person Stan Sloss that we have before us today a strong record in support of reform of BLM programs. Thank you very much for all your efforts in this regard.

NWF is optimistic that this year, with the change in administration and a new Congress, we can bring about new perspectives in the role of Federal agencies and public land management. We look forward to the development of the BLM management issues that are addressed in the BLM reauthorization bill, H.R. 1603.

NWF supports H.R. 1603 and the provisions that form BLM's management, including giving priority to the designation of areas of critical environmental concern, promoting inventory and protection of riparian areas, increasing penalties for violations of the act, and clarifying actions that are subject to judicial review.

I would like to focus my comments today on one of the new provisions in the BLM reauthorization bill that deals with National Conservation Areas.

As we see it, National Conservation Areas have been established to bring national attention to outstanding lands that are administered by BLM. Some of the benefits that come to the land designated as NCAs, or National Conservation Areas, are increased management attention by the BLM, in some cases increased funding for appropriations specifically for that management, and special protection for outstanding resource values.

We agree with the Chairman that standardization is needed in the management of NCAs. And we think Section 19 of the bill takes important steps in that direction. But I would hope that the committee could go further to clarify the meaning of a National Conservation Areas designation.

First, they should be designated on an ecosystem or watershed basis. And I think the committee could give direction to the BLM to provide that the areas that are identified as National Conservation Areas include within their boundaries, at a minimum, watersheds if not a general ecological region. And I think that you see in places like the Gila Box Riparian National Conservation Area a very snake-like boundary that follows right along the riparian habitat. Contrast that with the efforts in the Snake River Birds of Prey bill that includes not just the ecologically unique but the prey-based area for the Birds of Prey but also a fair amount of the ecoregion that is important for the Birds of Prey.

Second, with regard to management prescriptions, we think those management prescriptions for National Conservation Areas need to be spelled out on all public domain lands that are subject to threat or loss through disposal under the land laws, through ap-

plication and mining and mineral leasing statutes, and from live-stock grazing.

Section 19 addresses two out of three of these, and we would encourage the Chairman to consider addressing grazing management in NCAs, specifically as part of the overall management guidelines for these areas. We suggest that grazing be allowed to occur only where it is demonstrated it is compatible with National Conservation Area management.

Third, we would like the committee to give direction to land managers to be specific as to the resource values that are significant enough to result in that land being designated as a National Conservation Area.

What we find in the purpose statements in most of the National Conservation Area statutes, which are included as an attachment to my testimony, is that they identify both the specific reasons for the designation in the area as well as broad multi-uses of public lands, and that has resulted in some confusion on the part of the land managers in assigning and trying to balance the resource values out in the development and management plans for these areas.

And perhaps given the debate that we have just heard in the past hour, we should specifically address the scope of R.S. 2477 within the context of National Conservation Areas as well.

I would urge you to give consideration to these remarks. And I appreciate the opportunity to appear here today.

Mr. VENTO. Thank you for your testimony, Ms. Carlson.

[Prepared statement of Ms. Carlson follows:]

Working for the Nature of Tomorrow.



# NATIONAL WILDLIFE FEDERATION

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STATEMENT OF CATHY CARLSON, LEGISLATIVE REPRESENTATIVE,  
PUBLIC LANDS AND ENERGY DIVISION, NATIONAL WILDLIFE FEDERATION  
BEFORE THE  
SUBCOMMITTEE ON NATIONAL PARKS, FORESTS AND PUBLIC LANDS  
COMMITTEE ON NATURAL RESOURCES  
CONCERNING H.R. 1603, REAUTHORIZATION OF APPROPRIATIONS FOR THE  
BUREAU OF LAND MANAGEMENT

MAY 25, 1993

Mr. Chairman. Thank you for the opportunity to present the views of the National Wildlife Federation in our biennial review of the reauthorization of the Bureau of Land Management (BLM). The National Wildlife Federation (NWF) is the nation's largest conservation/education organization, and a national network of affiliated organizations, working to educate and assist individuals and organizations to conserve natural resources, and protect the Earth's environment.

Chairman Vento, you deserve a great deal of credit for your continued interest in the activities of the BLM. It is only through the tireless efforts of you and your staff, Stan Sloss, that there is a strong record of the need for major reforms in the BLM management programs. I thank you for your efforts.

I appear before the Subcommittee today to support H.R. 1603, the Bureau of Land Management Reauthorization Act of 1993. NWF has testified in support of numerous provisions of this bill in the past, which would:

- o give priority to the designation of areas of critical environmental concern;
- o promote inventory and protection of riparian areas;
- o require that BLM personnel below the Director be career employees;
- o increase the penalty for violations of the Act; and
- o clarify BLM actions that are subject to judicial review.

Today, I want to focus my remarks on one of the significant new provisions in the Reauthorization bill; the new standards for National Conservation Areas.

Over the past several years, Congress enacted a number of statutes designating lands administered by the BLM as National Conservation Areas. Attached to my testimony is a brief

The Honorable George Miller

May 8, 1991

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easements conveyed certain rights of access which have consistently been confirmed by the courts. Accordingly, to impose the onerous procedures contained in Title XI could well constitute a taking without compensation under the Fifth Amendment.

Finally, there is simply no evidence to suggest that the existing body of law and procedure concerning RS-2477 is inadequate to protect federal interests in Alaska. Thus, I object strongly to this amendment, because it singles out my State for discriminatory treatment and because there is no justification to support its enactment.

The first amendment also contains several significant flaws. First, by requiring holders of rights-of-way to file notice and other information prior to January 1994, the amendment would impose unwarranted burdens on governments and private citizens. In most situations, the existence of rights-of-way is already well known to federal land managers and the public. In Alaska, rights-of-way under RS-2477 have generally been inventoried. This is particularly true in the case of federal conservation system units, where the appendix to each management plan lists possible rights-of-way in a specific unit.

Second, by requiring federal officials to "investigate" each assertion of an RS-2477 right-of-way, the amendment would impose expensive and unnecessary burdens on federal officials and on persons defending the assertion of a particular right-of-way. Again, there is no evidence that existing procedures are not adequate to protect federal interests. Thus, under existing law, federal officials investigate RS-2477 assertions when particular land use conflicts or other problems arise. In the vast majority of circumstances, however, there are few problems with right-of-way usage, and a blanket requirement to investigate would accomplish little.

Third, the amendment would mandate new contest procedures, replacing a regime which has worked quite well. Further, the amendment would appear to give standing to virtually every member of the general public. Current standing requirements help ensure fair and orderly administrative consideration, and we see no reason to expand them in the current circumstance.

Fourth, the amendment would provide that a particular right-of-way is invalid prior to the completion of an administrative adjudication, thereby providing the Secretary with significant discretion to deny access. Consequently, a claimant could be involved in two administrative procedures simultaneously -- a



The Honorable George Miller

May 8, 1991  
Page Three

defense of his RS-2477 right-of-way and an application to the Secretary to continue access prior to final adjudication. In addition, the amendment would shift the burden of proof in the administrative proceeding from the Secretary to the claimant. We believe that this approach is inconsistent with the concept of an RS-2477 right-of-way as a valid property right.

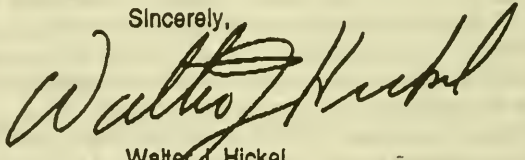
In closing, I want to reiterate my belief that the existing body of law and procedure, which has evolved over the course of more than a century, is perfectly capable of protecting the interests of all concerned, including the federal government. The changes mandated by the two amendments would, therefore, create significant burdens on non-federal parties, require substantial increases in federal appropriations, and engender confusion and needless conflict -- without improving land management in the western states.

We perceive other problems with H.R. 1096 which we will communicate separately to you and your staff.

Thank you for your consideration of my views.

With best regards.

Sincerely,

A large, stylized handwritten signature in dark ink, which appears to read "Walter J. Hickel". The signature is fluid and cursive, with the first name "Walter" being particularly prominent.

Walter J. Hickel  
Governor

cc: Senator Ted Stevens  
Senator Frank Murkowski  
Congressman Don Young  
Congressman Bruce Vento  
Congressman Ron Marlenee

**STATE OF ALASKA**  
**COMMENTS TO**  
**DEPARTMENT OF INTERIOR**  
**AND**  
**BUREAU OF LAND MANAGEMENT**

**ON**  
**"DRAFT REPORT TO CONGRESS**  
**RS 2477 RIGHTS-OF-WAY"**

**APRIL 15-16, 1993**

*Contact:*

*Lieutenant Governor Jack Coghill, 465-3520*  
*Governor Walter Hickel, 465-3500*  
*Box 110015, Juneau, AK 99811*

April 15, 1993, Fairbanks, Alaska - April 16, 1993, Anchorage, Alaska

WALTER J. HICKEL  
GOVERNOR



U.S. DEPT. OF THE INTERIOR  
BUREAU OF LAND MANAGEMENT  
WASHINGTON, D.C. 20250

STATE OF ALASKA  
OFFICE OF THE GOVERNOR  
JEROME

April 14, 1993

Mr. Ted Stephenson  
RS 2477 Project  
Bureau of Land Management  
Utah State Office  
P.O. Box 45155  
Salt Lake City, UT 84145-0155

Dear Mr. Stephenson:

It is with interest, concern, and resolution that the State of Alaska responds to the "Draft Report to Congress, RS 2477." We respectfully submit our comments.

In two enclosures, we point out deficiencies in the report, including misleading statements and questionable conclusions, and support what we believe are irrefutable points of law. We also make several recommendations. Please note that although we have addressed the issues we find most critical, we have not addressed every statement in the draft report with which we disagree.

Alaska is a young state. Our 1958 statehood compact with the United States promised Alaska the same rights enjoyed by other states. Among those rights is the right of access, derived from openly accepted principles of common law, well-known at the time the Alaskan people voted for the terms of our statehood compact.

Alaskans now sense that a serious erosion of rights is occurring regarding access to and across vast areas in our state. Established RS 2477 rights-of-way are valid and valued rights that must be protected.

Topping the list of legal positions on which the state is resolute is that RS 2477 rights-of-way are property rights recognized by both federal and state law for 100 years. Therefore, Alaska is opposed to any administrative or legislative "taking" of RS 2477 rights, regardless of what compensation may be offered.

Mr. Ted Stephenson  
April 14, 1993  
Page 2

*We believe that several basic principles concerning RS 2477 need to be clearly set forth in the report to Congress:*

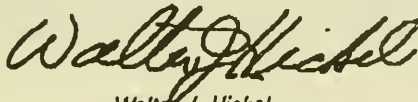
- 1. There is a finite number of RS 2477s grants; no RS 2477 rights-of-way could be accepted after October 21, 1976.*
- 2. Accepted RS 2477 rights-of-way are completed conveyances that cannot be summarily extinguished without compensation for the "taking."*
- 3. The law of the state where the RS 2477 is located has provided the criteria for the determination of the acceptance of the right-of-way under RS 2477; this principle was set forth in Department of Interior regulations as early as the 1930s.*

*Both of the enclosures review the report, but each treats the subject in a distinctive fashion. One is a discussion of the law, definitions, congressional intent, and costs, as the report treats or omits them. The second enclosure, written by planning, rights-of-way and transportation personnel, analyzes, questions, and refutes conclusions stated in the report. It also cites specific passages and pages in the document.*

*In our view, the greatest shortcoming of the report is that it lacks recommendations to the Congress, thereby denying the public, as well as the states, a meaningful opportunity to comment. Furthermore, it should place more emphasis on the official Department of Interior policy of 1988, which is a reasonable and credible foundation on which to build the future.*

*We look forward to the opportunity to discuss the issue with you as well as with the congressional committees which have initiated the current review of RS 2477 rights-of-way.*

*Sincerely,*

A handwritten signature in dark ink, appearing to read "Walter J. Hickel". The signature is fluid and cursive, with the first name "Walter" being the most prominent part.

Walter J. Hickel  
Governor



*Mr. Ted Stephenson*

*April 14, 1993*

*Page 3*

*cc: The Honorable Bruce Babbitt, Secretary of the Interior  
Pete Culp, Acting Director, Bureau of Land Management  
The Honorable Ted Stevens  
The Honorable Frank Murkowski  
The Honorable Don Young  
The Honorable George Miller, Chairman, House Natural Resource Committee  
Members, House Natural Resource Committee*

*Enclosures*

**Draft Report to Congress, R.S. 2477  
Legal Discussion**

**I. Introduction**

The draft report to Congress pertaining to R.S. 2477 rights-of-way ("ROWS") is deficient in that it mischaracterizes the nature of R.S. 2477 grants, disregards the role of state law, fails to analyze the costs and benefits of options for Congressional action, and provides no recommendations to Congress. It attempts to minimize, and ultimately ignore, the long-standing interpretations by the Department of the Interior and federal and state courts of the rights granted by the statute. The following discussion addresses each of these oversights in turn and offers specific recommendations.

**II. R.S. 2477 created property rights subject to the constitutional protections of the Fifth Amendment.**

As a preliminary matter, recognition of the fact that this report concerns primarily legal, rather than policy, issues is critical to provide Congress with a useful and accurate report. The draft report implies that the Department of the Interior and Congress are free to adopt policies which alter the rights obtained by the holders of these R.S. 2477 ROWs. This presents a misleading view of the law.

The provision known as R.S. 2477 granted property rights which vested in the holders of the ROWs upon acceptance of the grant. Any attempt to diminish or extinguish these vested rights would implicate the due process and takings clauses of the Fifth Amendment of the United States Constitution.

The offer made by R.S. 2477 was available for acceptance for over 100 years and, until recently, generated little controversy. The federal government and the states alike agreed the ROWs were accepted in accordance with state rather than federal law, and no action by the federal government was necessary. Beginning in 1938, the Department of the Interior's regulations formalized this statement of the law. With the passage of FLPMA, the right to accept the offer to create new ROWs was repealed. However, as the draft report recognizes, valid, existing ROWs were expressly protected.

Because they are property rights, R.S. 2477 ROWs are afforded due process protection and cannot be taken except for public purposes, and then only with the payment of just compensation. This constitutional protection is "directed against

R.S. 2477  
Page 1 of 6  
April 14, 1993

the enforcement of an act of the legislature which attempts to authorize the seizure or destruction of property against the will of the owner. ... [It] applies to all the sovereign powers of government which may be used to interfere with the quiet enjoyment of private property." It protects state and local government property interests as well.

The taking of a ROW can also effect a taking of the property the ROW serves if access to that property is thereby cut off, entitling the owner of the accessed property, as well as the holder of the ROW, to compensation. And when a street or highway is taken and the "remaining road system is inadequate ... the cost of supplying ... substitute [access] is the measure of compensation to which [the holder] is entitled." Obviously, any attempt to extinguish valid ROWs will require compelling justification and carry a substantial cost. Similarly, overly restrictive regulation of these ROWs could result in takings and have serious impacts on the federal treasury. The final report to Congress should make these points clear.

### III. The language of R.S. 2477 defines the nature of the grant.

As the draft report recognizes, the language of R.S. 2477 defines the nature of the grant. That language must be construed as Congress intended when the provision was enacted as part of the Mining Law of 1866. The draft report summarizes, without making any recommendations, the definitions offered by various respondents for the terms "highway," "construction," and "unreserved public lands."

The federal government and the states have long accorded the term "highway" in R.S. 2477 a broad meaning. This interpretation is supported by the purpose of the statute, and the ordinary definitions of the word, both in 1866 and today. R.S. 2477 was part of a law enacted to legitimize the practices of miners and homesteaders and others in entering and making use of the public lands. The policy of the government was to encourage settlement of the western territories. The early prospectors and settlers travelled by foot, by horse, by boat, by wagon, and, in Alaska, by dogsled. The modern, multi-lane thoroughfare we know as a highway today was beyond imagining at that time.

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<sup>1</sup> 2 Julius L. Sackman, Nichols' The Law of Eminent Domain §6.01 (3rd ed. 1993).

<sup>2</sup> Id., §6.11 [2].

<sup>3</sup> Id., 4A Nichols', §15.2.

As the Congressional Research Service (CRS) report recognizes, the dictionaries of 1860 and 1865 defined "highway" as "a public road, a way open to all passengers." Contrary to the CRS report's conclusion, common sense suggests that Congress, in 1866, considered a footpath created and used by the public for access to and across public lands to be a highway. This interpretation is supported by other sources as well.

Black's Law Dictionary defines "highway" as "an easement acquired by the public in the use of a road or way for thoroughfare; ... a free and public roadway; ... the generic name for all kinds of public ways, whether carriage-ways, bridle-ways, foot-ways, bridges, turnpike roads, railroads, canals, ferries or navigable rivers." Congress and the courts, historically and today, refer to navigable rivers as "highways" for commerce, trade and travel.

Reliance on the discussion of the meaning of the term "roadless" as used by Congress in the Federal Land Policy and Management Act (FLPMA) in 1976 is misplaced. The term is used in FLPMA to identify areas suitable for study as potential additions to the National Wilderness System. A broad reading of the term roadless might preclude study of land meriting consideration. This has no bearing on what Congress meant by "highway" in 1866 when it offered the ROW grant. Furthermore, as a general principle of statutory construction, statements by a later Congress are not reliable indicators of the intent of the earlier Congress. There is no support for an assumption that Congress, in 1866, intended a narrow, restrictive meaning for the term highway. The longstanding interpretation of the term to mean a road or way freely open for public travel, formalized in the Department's 1988 policy, is correct, and neither the executive nor legislative branches of government have power to change that meaning as a matter of policy.

In a 1980 Solicitor's opinion which has since been superseded by a 1988 policy formally adopted by the Department of the Interior, the Deputy Solicitor made a long leap from the definition of roadless in the legislative history of FLPMA to a requirement of mechanical construction under R.S. 2477 to avoid a perceived potential for conflict between the two statutes. As the draft report notes, the Solicitor's office chose to ignore both state and federal case law in this opinion. There is no legal justification for construing away a right to a ROW for a public way because it does not meet the suggested requirements for a road which would disqualify an area from wilderness study, especially when those requirements are gleaned from a committee report rather than the statute itself.



As with "highway," the meaning of the word "construction" in R.S. 2477 has generated differences of opinion. And, as noted above, the view pressed by the CRS Report is overly narrow. It is premised on the mischaracterization of "highway" as meaning a modern thoroughfare, and borrows from the legislative history of a statute enacted 110 years later to require mechanized construction. The Congress of 1976 and the Congress of 1866 were operating on different sets of facts, with different goals. FLPMA's legislative history is simply irrelevant to the meaning of R.S. 2477.

To postulate that the 1866 Congress contemplated mechanized construction as a prerequisite for creating legal access across the vast new western lands of this country is illogical. Most of the early pioneers had neither the means, the time, nor the need for mechanized construction. R.S. 2477 must be interpreted in light of the conditions then existing. Again, the Department's 1988 policy takes a realistic and prudent view of what is meant by the term "construction." It is consistent with the interpretation adopted by state and federal courts. To change these definitions now would impair vested rights explicitly protected by FLPMA, as well as by the Constitution.

IV. The draft report fails to analyze the costs and benefits of the options presented.

The draft report fails to analyze the costs and benefits of the options presented. Such an analysis is essential for a meaningful discussion of the options and formulation of alternatives. The costs can be divided into 3 broad categories.

The first category is takings claims. These claims will arise if Congress or the executive branch fails to recognize valid ROWs or attempts to regulate them too narrowly. It cannot be overstated that R.S. 2477 ROWs are valid existing rights, the holders of which must either be protected or compensated.

The second category of costs is litigation costs. Takings claims would generate substantial litigation costs in addition to the amounts required as compensation. Trials, particularly those requiring inquiry into factual issues and long past events, are expensive and time-consuming. In addition, any option which ignores the legitimate role of state law and over 100 years of legal precedent will add significantly to both the volume and the expense of the resulting litigation.

Third, different courses of action will have varying administrative costs. For example, adoption of a cumbersome

federal validation system would generate substantial costs for processing claims. The process set out in H.R. 1096 requires publication of notice, investigation by the agency, adjudicatory hearings, and appeals to the Secretary. These procedures are labor intensive and expensive. Compressed timelines such as those proposed in H.R. 1096 would cause a flood of assertions, diverting scarce resources from other essential tasks. The final report to Congress must examine the impact of the various options on the state and federal treasuries and on the financial resources of the citizens who will be affected.

Sweeping changes in the recognition and administration of R.S. 2477 ROWs are unnecessary and ill advised, from both a legal and a policy standpoint. Legally, Congress and the executive branch are constrained by the inescapable fact that these ROWs are vested rights, protected even without FLPMA's savings clauses. As a matter of policy, changing the rules at this late date will be costly, time-consuming, and without justification.

#### V. Alaska is unique.

Alaska's unique circumstances make R.S. 2477 ROWs an integral part of the state's transportation network. Alaska is vast, containing one-fifth of the nation's land. Our transportation infrastructure is in its infancy and costly to enhance. Prior to statehood, the Territory of Alaska encountered difficulty in obtaining funding to construct roads. Nearly two-thirds of Alaska will remain in federal ownership, with large blocks in conservation system units. Large holdings by Native corporations also contribute to a checkerboard pattern of land ownership which makes access difficult.

Continued access to and across land now in private hands or in conservation system units is essential to both development and conservation in Alaska. Because Alaska is a young state, formal recognition of many access routes has not yet occurred. Any statute of limitations provision must take this into account and allow a sufficient period of time to protect the public's rights. A minimum of 20 years would be necessary for R.S. 2477 assertions to occur in an orderly and thoughtful manner.

Although several statutes applicable to Alaska address access, there are no viable alternatives to R.S. 2477 ROWs in Alaska. As the draft report recognizes, easements reserved pursuant to §17(b) of the Alaska Native Claims Settlement Act are insufficient. They are only reserved across Native lands for limited purposes and are subject to cancellation under certain circumstances. The ROW provisions in Title XI of the Alaska National Interest Lands Conservation Act are so cumbersome they

have never been used.

The draft report states that Congress could cancel all R.S. 2477 ROWs and replace them with ROWs issued pursuant to FLPMA. This suggestion ignores the very substantial takings implications of such a course of action. ROWs under FLPMA are an entirely different species of property interest from the rights granted by R.S. 2477. FLPMA ROWs are subject to substantial secretarial discretion and regulation which are inapplicable to R.S. 2477s. Annual rental at fair market value can be charged for FLPMA ROWs. The secretary can set the duration, terms and conditions, and uses of a FLPMA ROW. FLPMA ROWs are only available on public lands and National Forests, not parks, refuges or monuments. Congress simply cannot substitute one for the other.

## VI. Recommendations.

The draft report fails to make recommendations to Congress. As a result, interested and affected parties are denied any meaningful opportunity to comment on specific recommendations before they are forwarded to Congress. However, there are several recommendations that should be made.

First, the final report should recommend formalizing 100 years of public land law. Adjudication of rights under R.S. 2477 should continue to occur in state forums, according to state law. Second, it should recognize that the 1988 Department of the Interior policy contains workable standards that could be adopted as minimum federal standards to which states could be subject. Third, it should recommend that Congress consider enacting a limited waiver of sovereign immunity, similar to the McCarran Amendment for adjudication of water rights, to allow the federal government to participate in the R.S. 2477 adjudication process without disrupting state property rights.

Finally, it should specifically recognize state procedures. The regulations recently adopted by Alaska and provided with our earlier comments contain a fair method for determining the validity of R.S. 2477 claims. They require documentation, public notice, evaluation, and adjudication if warranted, of ROW claims. Under a state oriented procedure, coupled with a waiver of sovereign immunity to permit the federal government to participate in validity determinations, a statute of limitations would be unnecessary. This would be the most cost-effective alternative for the federal government, both in terms of administrative costs and liability.

AN ANALYSIS OF THE "REPORT"  
by Personnel in State of Alaska's  
Planning, Rights-of-way, Highway Construction

ALASKA POSITION

RS 2477s are existing rights which can not be changed or modified unilaterally.

In 1988 the State of Alaska worked with the Department of Interior (DOI) to develop a policy statement on RS 2477 so that some general areas of agreement could be established. Although we did not agree totally with the DOI policy as it was finally adopted, at least we were satisfied that an attempt had been made in good faith to work with affected parties to clarify the issues. We consider the 1988 policy statement to be the federal position on RS 2477 and suggest that unilateral revisions are inappropriate in light of the extensive cooperative effort that went into its development.

STATEHOOD COMPACT

A major part of the statehood debate concerned how the proposed State of Alaska would develop an economy so that it would not be a drain on the federal treasury and could enjoy equal status with other states. In order for the new state (Alaska) to enter the Union on equal footing with other states, Congress increased the land available for selection so that an economy could be developed through resource development on the land received.

Subsequent federal withdrawals and federal management decisions have made access to these lands for resource development problematic. In addition, access has been denied or diminished. We have not entered the union on equal footing. Some of the basic agreements concerning statehood now hinge on whether adequate access exists across federal lands.

The fundamental issue facing Alaska is the continuing pattern by the federal government of limiting access to our land and resources. RS 2477s are a critical part of Alaska's access options.

ALASKA'S INTENT

Alaska's intent to protect its RS 2477 rights is not an indication that improvements of these rights-of-way, or even regular maintenance, are imminent. Some rights-of-way will be of value in providing access to state resources, communities and land. Others continue to be used as they have in the past. Some may not be used



at all or may be developed for something as benign as a hiking trail. It is incorrect to assume that protection of these existing rights makes future improvement automatic.

REPLACE RS 2477 RIGHTS WITH FLPMA  
AND ANILCA RIGHTS-OF-WAY?

The draft report conveys a message that RS 2477 rights-of-way could be replaced with permitted FLPMA rights-of-way.

FLPMA rights-of-way are not an acceptable substitute for existing RS 2477 rights-of-way. They are subject to substantial secretarial discretion including duration, terms, conditions, rental, use limitations and revocability.

Such a conversion would categorically change the nature of the RS 2477 right-of-way from what was established over time through court decisions and administrative agreements to one where the nature of right-of-way could be unilaterally determined by federal land managers. On the face of it, this option is not acceptable and any attempt to impose such a conversion would be viewed as a taking of valued property.

The report also lists Title XI of ANILCA as an Alaskan alternative to RS 2477. As the report correctly points out, Title XI is a process, NOT an authority. This alternative is not viewed as a viable option in Alaska. Title XI decisions are based totally on compatibility with unit management and do not take into account the merits of a project. Also, if wilderness or National Park Service managed land is involved, most rights-of-way specifically take an act of Congress.

Title XI requires extensive and costly up-front work to be completed prior to a compatibility determination by federal agencies. Potential project developers must gamble on whether access will be approved. There are few investors who would willingly develop a project where such high up-front costs and risks are involved. An example follows:

In November of 1983 Cominco Alaska filed an application under Title XI for a transportation utility corridor across Cape Krusenstern National Monument, a unit of the National Park System in Northwest Alaska. The land they were attempting to access with the corridor was the Red Dog ore body, a world class mineral deposit only 55 miles inland. Yet, despite the merits of the project Cominco abandoned the Title XI process because there were too many access uncertainties associated with it. As a measure of the level of frustration they experienced with the process, it is instructive to note that they abandoned the process in favor of a land trade negotiated with Congress. Alaska does not expect future Title XI exercises to be less cumbersome or more successful.

Page specific comments

The report contains many questionable and misleading statements. The following comments address a few of them.

## Page 15

Addressee the possibility of "statute of limitations". In 1985 BLM wrote Alaska (BLM district manager to Alaska Department of Transportation) that there is no statute of limitations on assertions. It has been Alaska's practice, and is still Alaska's position, that the 1985 BLM information is valid.

## Page 16

The first paragraph: The report should point out that federal action in the past has deferred to local and state actions and policies. Access has been enjoyed for decades over some RS 2477 rights-of-way. Federal resources have gone into improvement of many of these routes.

## Page 21

This page notes twice that in FLPMA Congress made it clear that valid, existing rights are protected. The same is true in ANILCA. The report should consistently indicate that contemporary land management decisions are subject to valid existing RS 2477 rights-of-way.

## Pages 22-23

This section indicates that Title XI of ANILCA offers adequate rights-of-way in Alaska and then presumes why the process has not been used. That the process is expensive and cumbersome is an understatement. See previous comments under REPLACE RS 2477 RIGHTS WITH FLPMA AND ANILCA RIGHTS-OF-WAY (p. 2, Attachment B)

## Page 27

The last paragraph states "...if the road was constructed by or for the federal government...it would not qualify as an RS 2477 highway." This statement is erroneous. As stated, it would appear that anything built by the Alaska Road Commission or the Bureau of Public Roads would not qualify. This is contrary to the 1988 DOI policy and contrary to more than 100 years of state and federal law.

## Page 43

Page 43 refers to "...indefinite recognition of future RS 2477 rights-of-way...". This verbiage is incorrect and misleading. The Report should send these messages: (1) there is a finite number of RS 2477's. (2) There will not be any future RS 2477's. (3) RS 2477 rights-of-way either exist as of 1976 or they do not exist. (4) RS 2477 rights-of-way are valid, existing rights to which subsequent actions are subject.

## Pages 53-60

Many of the constituency concerns included on these pages should be incorporated throughout the Report rather than relegated to the last several pages. These comments that recognize valid existing rights and more than 100 years of existing state and federal law support Alaska's position. We believe they should have more prominent placement in the Report.

## Page 65

Alternative 5: While the language is unclear, the discussion of the "Alaska Alternative" implies that unconstructed section line dedications are not valid. The State of Alaska and the federal government disagree on this point.

## Pages 66 and 69

Tables are misleading and over simplify issues. To say that under any of the restrictive proposals there would be no taking is presenting only one perspective on a polarized situation. The same is true of the conclusion that there would be "no impact" on access to federal land. This is especially important since people may be inclined to study only the tables in lieu of reading the entire Report.

## Pages 65 and 68

These pages discuss the possibility of an RS 2477 assertion "sunset" provision. The State of Alaska does not support a "sunset" provision for RS 2477 rights-of-way. If a "sunset" provision on assertion is imposed, it must allow a sufficient period of time to protect the public's rights.

More General Comments

The discussion of "casual use" scattered throughout the Report adds little. It should be made clear that "casual use" is not assured and cannot serve most needs relevant to RS 2477.

Any administrative or legislated "taking" of RS 2477 rights is not acceptable to the State of Alaska.

Alaska has a validation process in place. The Department of Interior should recognize that process and consider deferring to the State.

The Report offers no recommendations. The State of Alaska makes recommendations (above and in Attachment A) and requests to be part of the recommendation and decision making process. The directive from Congress (to compile the Report) is specific when it requests "...sound recommendations for assessing the validity of claims to result from this study..."

CONCLUSION

A discussion and analysis of the entire Report would take many pages of detailed verbiage. Participation in all future deliberations is requested by the State of Alaska.

We emphasize that the State considers the RS 2477 issue as a precious legal right or legal grant. The State does not consider RS 2477 to be a "policy" matter that can be molded, whittled down, or rewritten by bureaucrats.

The Report implies "policy" throughout; that implication is incorrect.

The purpose of the DOI report is to gather information and public input on the RS 2477 issue. The mandate for this Report emphasized gathering information from the affected states and presenting it to Congress. It is inappropriate for the DOI Report to "parrot" the Congressional Research Service report. The State has identified serious legal and policy problems with the content of the CRS report. These problems need to be resolved. The CRS report should not be relied on extensively as a resource document. We recommend that the DOI report be reorganized to emphasize input from western public lands states and other affected interests.



BRIEFING PAPER  
R.S. 2477 RIGHTS OF WAY

HISTORY AND ISSUE:

Congress enacted, in 1866, a grant of rights of way for the "construction of highways" over unreserved public lands. The grant was enacted as Section 8 of the Mining Act of 1866, and later became Section 2477 of the Revised Statutes (R.S. 2477). The enactment in 1976 of the Federal Land Policy and Management Act (FLPMA) repealed this section but protected valid existing rights.

*"And be it further enacted, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."*

The majority of the United States' western states are founded on property acquired by the Federal Government subsequent to this country's establishment. In the late 1800's the western territories, now the "public lands" states, were still largely unsettled. To encourage settlement and development of the land, and to resolve substantial concerns regarding trespass on Federal property, the Federal Government enacted R.S. 2477. The provision guaranteed that access across the territories, and to inholdings, would be provided as the land remained Federal property, or was transferred to state or private ownership. Because the characteristics of usage and conflict resolution differed so greatly between what is now North Dakota and California, state and local law was left to provide the details regarding the terms of and acceptance of the grant. Under this authority, rights of way were still being created, and thereby granted, under R.S. 2477 until its repeal by FLPMA in 1976. In turn, FLPMA established new procedures for the creation of new rights of way. To this day R.S. 2477 rights of way, some developed into major highways and others still horse or dogsled trails, provide vital means of access across Federal, State and private properties.

It is not disputed that R.S. 2477 rights of way, and the confidence placed on the durability of access they provide, played a significant role in the exploration, settlement and social, economic and political development of the West. R.S. 2477 rights of way are an issue now due to recent efforts in Congress to enact legislation which would require each right of way to

be called into question and Federally validated. Prompting the legislation are interests critical of the lack of uniformity among local validation processes, contention over the definition of 'highway', and 'construction', as they apply to those processes, and the belief that rights of way created since FLPMA will be asserted in those same processes. Three separate efforts to pass this legislation in the 102nd Congress have failed, but language was enacted that required a study to be conducted on RS 2477; and a report issued by May 1993. That study is under way by the Bureau of Land Management.

#### STATE OF ALASKA'S VIEW:

Most of Alaska's great expanse is Federal property, and was settled profoundly with the use of and dependence upon the transportation and access grants provided by R.S. 2477. The State, local governments and private property holders all have become vested in those property rights, especially because they were relied upon in subsequent land selections, land acquisitions and property development. There exists today no satisfactory alternative to create new rights of way in Alaska. Processes created by nation-wide and Alaska specific land management legislation have served to discourage rather than encourage the development of rights of way. Because this is the case, maintenance of existing R.S. 2477 grants is especially imperative.

A recent report authored by Pamela Baldwin of the Congressional Research Service discusses the case that a federal process should be established to subsume the state processes regarding delineation and validation of R.S. 2477 rights of way. A new federal process, however, would create an additional bureaucracy and place a difficult burden of proof on those who have put confidence and reliance on existing local processes.

Congressional intent and Federal Case Law both have recognized that R.S. 2477 rights of way were a standing offer by the Federal Government, requiring only public use and acceptance. This recognition, that R.S. 2477 is a matter of state law, is affirmed by a 1988 administrative decision of the Department of the Interior.

The existing body of law and procedure, evolved over more than a century, is perfectly capable of protecting the interests of all concerned, including the Federal Government. The changes mandated by the legislation would

create significant additional burdens on non-Federal parties, require substantial increases in Federal appropriations, and engender confusion and needless conflict without improving land management in the western states. This legislative proposal is without foundation that any environmental harm is created by the proper use of valid R.S. 2477 right of ways, or that any environmental benefit will be created by application of such a Federal process.

The standard that the local law would affirm what constituted an R.S. 2477 right of way is the accepted practice. More significant is the fact that this is the standard under which State, local and Native Corporation land selections have been made, and patents applied for and perfected.

To validate its R.S. 2477 rights of way, the State of Alaska has adopted an extensive regulatory program to nominate and identify existing, valid R.S. 2477 rights of way. The regulatory process the State of Alaska has adopted provides a fair method for determining whether R.S. 2477 rights of way are valid. The regulations neither attempt nor allow the establishment of new rights of way. The State of Alaska will only affirm the irrevocable property rights established under R.S. 2477, based on documented historical use, prior to October 22, 1976. The evaluation process established in 11 AAC 51 affords everyone, federal agencies, state agencies, private property owners and members of the public, a voice and a role in each determination.

Mr. THOMAS. And Mr. Smith has a statement.

Mr. VENTO. Without objection, his statement will be put in the record.

[The information follows:]

STATEMENT OF CONGRESSMAN ROBERT F. (BOB) SMITH

Mr. Chairman, sometimes those of us on this side of the aisle feel like Bill Murray in the recent movie "Groundhog Day," which is a story of a man who was forced to live the same day over and over again.

Every Congress we have to wake up and go through the futile hearing process on a BLM reauthorization bill that will never become law. It's the same old story every Congress. The Chairman rams this bill through the House, and the Senate kills it.

Whereas "Groundhog Day" was a comedy, the bill we will be hearing today is a tragedy for those of us from states, that unlike Minnesota, have a significant amount of land owned by the BLM.

This is a buffer zone bill, plain and simple. And because this bill requires buffer zones around conservation system units, I want to review the areas in Oregon that may be impacted.

The BLM already controls over one-quarter of my state. We have 2.1 million acres of wilderness, 1,800 miles of wild and scenic rivers, 200,000 acres of National Parks, 430,000 acres of National Recreation Areas and several hundred miles of national trails.

This bill would place buffer zones around these so-called conservation system units areas. It's equivalent to drawing lines around the 10,000 lakes in Minnesota and placing them off-limits to everything. It's a not-so-very clever way to expand the federal domain and turn the BLM from a multiple-use agency into a single-use agency.

Let me talk for a moment about two other sections in this bill. This bill establishes an Organic Act for National Conservation Areas. In the two previous Congresses, I've introduced legislation to establish an NCA at Steens Mountain in eastern Oregon. The language in HR 1603 would make a Steens NCA totally unworkable. An NCA would just be a code name for a National Park.

Finally, Oregon already has the largest number of recognized RS 2477 right-of-ways. We don't want or need the proposed unfair and expensive process to investigate and adjudicate rights of way claimed under RS 2477 that is called for in this bill.

I urge this Committee to report a simple 8-line reauthorization. Going through this exercise again is not in anyone's interest.

Thank you.

Mr. THOMAS. I have a couple of questions. We have been on this issue long enough. I am a little confused. You speak of permits to use roads and so on.

Do you see a right-of-way as a property right?

Mr. SIMON. I believe the grant is for the use of the existing type of use, character of use, that is ongoing.

Mr. THOMAS. Rights-of-way, I think, are property rights, are they not, granted by the State prior to 1976?

Mr. SIMON. I don't believe they are granted by the State, Congressman.

Mr. THOMAS. By the United States.

Mr. SIMON. By the United States?

Not being a property rights lawyer, I don't want to get into deep water on this issue—

Mr. THOMAS. You used the words, permit and right-of-way, interchangeably, and it seems that there is quite a bit of difference.

Mr. SIMON. It is certainly true that none of the legal guarantees that would be afforded a local government or private claimant would kick in unless the claim has been validated.



So there is at least a point where the claim becomes something more than that.

Mr. THOMAS. Ms. Shogan, did your organization represent wilderness?

Ms. SHOGAN. Southern Utah Wilderness Alliance.

Mr. THOMAS. And you are here all the time.

Ms. SHOGAN. All the time. Unfortunately.

Mr. THOMAS. That is interesting. And your group drafted these R.S. 2477 provisions?

Ms. SHOGAN. Our three suggestion for the bill today? Yes.

Mr. THOMAS. And there seems to be some difference of view about them.

Did you consult with local governments on these?

Ms. SHOGAN. We are in daily contact with local governments. We have eight employees in the State of Utah.

Mr. THOMAS. Did you have a contact on this issue in any sort of agreement.

Ms. SHOGAN. On R.S. 2477? Daily basis.

We have been involved in the Burr Trail case for a number of years.

Mr. THOMAS. You are coming here with ideas about hopefully coming together with a solution.

Did you have any contact with anyone looking for something you might find a common interest in?

Ms. SHOGAN. We have been open to discussion for a number of years.

Mr. THOMAS. Okay. Thank you.

Mr. VENTO. The point is, you were talking about her draft of her testimony, not the bill, Mr. Thomas?

Mr. THOMAS. I am talking about the bill.

You didn't participate in the drafting of this section of the bill?

Ms. SHOGAN. No. What I said was, I drafted our three suggestions for the R.S. 2477. I had nothing to do with the bill.

Mr. VENTO. Not directly. But I thought there was maybe a little misunderstanding.

Thank you all very much for your testimony. We appreciate it.

**PANEL CONSISTING OF GEORGE LEA, PRESIDENT, PUBLIC LANDS FOUNDATION; CATHY CARLSON, LEGISLATIVE REPRESENTATIVE, PUBLIC LANDS AND ENERGY DIVISION, NATIONAL WILDLIFE FEDERATION; NANCY GREEN, DIRECTOR, BLM PROGRAM THE WILDERNESS SOCIETY; AND CONSTANCE E. BROOKS, ESQ., DENVER, CO**

Mr. VENTO. Let me ask for the next panel.

Changing places, we have George Lea, Public Lands Foundation; Ms. Cathy Carlson, National Wildlife Federation; Nancy Green, The Wilderness Society; and, finally, Ms. Connie Brooks from Denver, Colorado, a citizen, witness.

Your statements have been made a part of the record, and I would like you to summarize your statements in five minutes. And I know that is difficult, given the time that you spent on these and the work that you have given and the breadth of the bill. But, hopefully, we will get through some of the questions and be able

to focus on more of the points that you would otherwise make in a longer statement.

Mr. Lea, please proceed.

### STATEMENT OF GEORGE LEA

Mr. LEA. Thank you, Mr. Chairman.

As the national organization of retired BLM former employees, we really believe we understand what is happening to the public lands, and I want to thank you for this opportunity to appear here today and express our views on H.R. 1603 and to offer additional amendments to FLPMA.

In regard to the areas of critical environmental concern, we believe that BLM has been doing a good job in following the instructions in FLPMA; and the amendments offered here today, could, if interpreted correctly, reinforce that original language of FLPMA.

We do, however, find that the proposed wording of Section 103(a)(3) leaves the intent of the Congress unclear by stating that an ACEC may be identified to, quote, "protect or enhance the resources and values of a conservation system unit" and then goes on to state that, quote, "it is not the intent of Congress that the Secretary establish protective perimeters or buffer zones around a conservation system units," leaves a big question for us.

To establish an ACEC for the purpose of protecting the critical resource of an established conservation system unit is, in fact, establishing a protective buffer. We suggest that ACECs not be used for these purposes but for the purpose of protecting the resource values within the ACEC as originally intended by FLPMA. Where BLM lands adjoin a conservation unit, BLM should be a good neighbor and prevent any unnecessary impairment of the values of the conservation unit but not by establishing an ACEC.

Also the proposed amendments to ACECs do not overtly introduce the concept of dominate or single-use management for all ACECs. However, these amendments might be construed to do so. Many ACECs contain a mixture of resources, the management and use of which are compatible with the critical resources being protected. As a practical matter, designating specific conservation areas often is more expedience of the moment where Federal agencies and constituents struggle for turf rather than for a real concern for what is best for the natural resources involved.

Conservation areas are proposed to head off the establishment of a national park or a refuge or, in other cases, to prevent BLM from becoming a full partner in public land management as mandated by FLPMA.

The Public Lands Foundation believes that piecemealing the public lands administered by BLM is not needed to attain proper management of the land's resources. FLPMA contained all resources needed to maintain the public land as a national system similar to the national forests and refuges and parks.

We believe that H.R. 1603 should be broadened to create a national system and to give the public land a distinctive system name. We continue to suggest the name "National Resource System" as an appropriate name. This designation would be a major step toward focusing attention and support for all the BLM-administered public lands and all the national resources contained there-

in and not simply addressing some areas identified as a conservation system.

In regard to Section 6 of your bill, the professional qualifications, we are very pleased to see this clarification amendment. The adoption would correct an inadvertent result of the Civil Service Reform Act of 1978 which can be construed itself as having revised FLPMA so as to permit designation of top-level BLM positions as general positions in the Senior Executive Service, with the result that they would be open to noncareer appointees. Review of the legislative history of FLPMA makes it clear that Congress didn't intend to create the politicization of BLM leadership.

In regard to Section 18, this proposed amendment should perhaps be entitled "biological diversity." We support the concept of maintaining biological diversity of public lands; however, the wording here is very restrictive and eliminates the use of any new science which, for example, may include vegetative manipulation or the use of species that have been proven to be useful in soil protection or the establishment of a viable game species.

We simply suggest that the term "biological diversity" first be defined and further debate be held on this concept as it relates to multi-use management.

Mr. Chairman, we offer other amendments for your consideration. One of the proposals that we are making is that H.R. 1603 was to authorize BLM's program. But it has become a major legislation to amend FLPMA. The 20-year anniversary of FLPMA would be in 1996. Perhaps now is a time to consider the comprehensive evaluation of the implementation of the law, focusing on the future and thus be forward-looking.

We suggest the formation of a national panel of distinguished citizens of a nonpartisan nature to carry out such review leading to recommendations to the Secretary and to the Congress.

Mr. Chairman, I will close at this point but only to say that our statement suggests other amendments to FLPMA; make minerals and mining a full partner in the planning system; provide the authority for the Bureau to charge for the electronic records; develop a definition of ecosystem, which has become an important concept in public land management; and again repeal certain ancient laws, established in the 1800s.

Thank you, Mr. Chairman, for this opportunity and your leadership with this committee. And we hope that our views will be of help to you in your work.

Mr. VENTO. Thank you, Mr. Lea.

[Prepared statement of Mr. Lea follows:]





For America's Heritage

Public Lands Foundation

P.O. Box 10403

McLean, Virginia 22102

STATEMENT BY GEORGE LEA, PUBLIC LANDS FOUNDATION ON H.R. 1603, TO AUTHORIZE APPROPRIATIONS FOR THE BUREAU OF LAND MANAGEMENT FOR FISCAL YEARS 1994 THROUGH 1997. BEFORE THE NATIONAL PARKS AND PUBLIC LANDS SUBCOMMITTEE OF THE HOUSE NATURAL RESOURCES COMMITTEE, MAY 25, 1993.

Mr. Chairman, I am George Lea, President of the Public Lands Foundation. As a national organization of retired but still dedicated former BLM employees, the Foundation has a unique body of knowledge and expertise. More importantly, we truly understand what is happening to the public lands. We thank you for this opportunity to appear here today to express our views on H.R. 1603 which would authorize appropriations for BLM programs, and propose amendments to FLPMA. We also recommend additional amendments.

### **Sec. 3 FLPMA Definitions.**

#### *Areas of Critical Environmental Concern*

We have no objections to the proposed amendments to Section 103. We believe BLM has been establishing ACEC's following the current FLPMA requirements and believe the proposed amendments should simply reinforce the original language of FLPMA. We do however find the proposed wording of Sec. 103(a)(3) still leaves the intent of Congress unclear. By stating that ACEC's may be identified to ... "protect or enhance the resources and values of a conservation system unit", and then to continue by stating ... "but it is not the intent of Congress that the Secretary establish protective perimeters or buffers zones around conservation system units" leaves a big question. To establish an ACEC for the purpose of protecting the critical resources of an established conservation system unit is in fact establishing a protective buffer. We suggest ACEC's not be used for these purposes but for the purpose of protecting the resource values within the ACEC as originally intended by FLPMA. Where BLM lands adjoin a conservation system unit, BLM should be a "good neighbor" and prevent any unnecessary impairment of the values of that conservation unit but not by establishing an ACEC.

The proposed amendments to ACEC's do not overtly introduce the concept of dominate or single use management for all ACEC's. However these amendments might be construed to do so. Many ACEC's contain a mixture of resources, the management and use of which are compatible with the critical resources being protected. However, if not compatible those uses would be restricted or modified to protect the primary reason for the ACEC. The point being



that not all ACEC's need be segregated for all other uses of the land, only from those that are not compatible.

Specific resources to be managed are listed under definitions and in other sections of FLPMA. These create a problem in the likely omission of other important resources. We recommend that paleontological resources and wilderness resources be included.

Since passage of FLPMA in 1976, ecosystem management has become an important concept in public land management and will undoubtedly continue to be significant. This concept is not prohibited by FLPMA but it is not embraced by current law. We recommend that ecosystem and ecosystem management be defined now to eliminate confusion of the term and suggest the following definition be added to H.R. 1603:

*Ecosystem Management.* Ecosystems as used in conjunction with ecosystem management, consist of those biomes for which information exists or can reasonably and timely be developed, and are identified after public comment, as significant or important, and are then listed in the land use plan as defining the ecosystem which will be considered for management decisions with the planning area.

#### *Conservation System Unit.*

In the history of the west when settlement and development were national goals, the public lands were looked upon as a means to accomplish these goals by transferring them out of federal ownership. Later it was believed that certain lands might serve public purposes if left in federal ownership. So numerous lands were designated for national parks, forest and refuges, etc. After lengthy national debate FLPMA became the organic act for managing the remaining public lands. FLPMA established a national policy for the retention and management of the public lands eliminating the need to further segregate the land into individual areas. As a practical matter, designating specific Conservation Areas often is for expedience of the moment where federal agencies and constituents struggle over "turf" rather than a real concern for what is best for the natural resources involved. Frequently a conservation area is proposed to head off the establishment of a national park or refuge or in others cases to prevent BLM from becoming a full partner in public land management and as mandated by FLPMA.

The Public Lands Foundation believes piece-mealing the public lands administered by BLM is not needed in order to attain "proper management" of the land's resources. FLPMA provides all the principals and objectives needed to manage the public lands as a *National System* similar to the recognized systems for national forest, refuges and parks.. But FLPMA did not make this declaration even though FLPMA was originally named the National Resource Land Policy and Management Act. We believe H.R. 1603 should be broadened to create a national system and to give the public lands a distinctive system name. We continue to suggest that name be the National Resource Lands System. The public lands in the system could be further categorized or identified for management purposes under the planning and other provisions of FLPMA. These further defined areas could be predicated on the basis of ecosystems that better fit the natural and biological characteristics of the land rather than for an individual resource or politically motivated designation under an individual named conservation system

unit. This declaration of a national land system would be a major step towards focusing attention and support for the protection of all BLM administered public lands rich in wildlife, recreation, archeology, scenery, open space, and all the other natural recourses and not address only some areas identified by a conservation system designation.

#### **Sec. 6. Professional Qualifications.**

We are very pleased to see this clarifying amendment. The adoption would correct an inadvertent result of the Civil Service Reform Act of 1978, which can be construed as having revised FLPMA so as to permit designation of top-level BLM positions as 'general' positions in the Senior Executive Service, with the result that they would be open to non career appointees. We believe the general public are also pleased to have this clarified. A review of the legislative history of FLPMA makes it very clear that Congress did not intend to permit the politicization of BLM leadership and expressed that policy in section 301(c) of FLPMA. Certainly it would not be in the best interest of managing the nations public resources nor of BLM as a career, professional land-management agency to allow such to occur.

#### **Sec. 8 Management of Land and Public Participation.**

##### *Advisory Councils*

Throughout our careers as BLM employees PLF members have extensive experience in working with advisory councils in management of the public lands. They can be an important component in that management. More often than not citizens are appointed to the advisory councils based upon their partisan connections rather than on their knowledge and experience with public lands and the resources involved. This can and has set up disharmony within a council making it very difficult for the councils to be effective in assisting BLM with its management responsibilities. We recommend changes to this section to clarify that advisory council members qualifications be based on their knowledge of the public land resources and their uses. The best way to accomplish this would be to simply exclude advisory committees and councils from the provisions of the Federal Advisory Committee Act.

#### **Sec. 10. Exemption From Strict Liability.**

Many of the nonprofit entities that acquire right-of-way provide commodities, i.e., water, electricity, etc., to for-profit enterprises. We feel that nonprofits should be treated the same as for profit enterprises in responsibility and liability for damage or harm to the public land and not allowed to pass these liabilities on the tax payers.

#### **Sec. 14. Claimed Rights-of way.**

We agree with the concepts in Sec. 14 concerning recordation of claimed rights-of-way under RS 2477 in order to bring finality to this open-ended issue. Final action on this section should wait until the report to Congress has been assessed. That report from BLM is due in June 1993. Our preliminary review of the draft report indicates it contains valuable information and analysis necessary to pass judgment on Sec. 14.

### **Sec. 15. Wild Horse Sanctuary Report.**

The establishment of private sanctuaries addressed in this section was a foolish idea from the beginning. Reality has set in and both the BLM and the private operators now realize this to be the case. But now this mistake is costing the tax payers dearly for the continued maintenance of a few hundred horses. One thing is for sure and that is that BLM should not add new horses to these horse farms. Our only comment on the proposed amendment is to ask that the Congress not make the reporting and waiting period so onerous as to discourage BLM from phasing these so called sanctuaries out, over time, beginning with consolidation of the existing ones to reduce costs.

### **Sec. 18. Management of Public Lands Relating to Natural Productive Capacity.**

The proposed amendment should perhaps be titled "Biological Diversity". While the Foundation supports the concept of maintaining biological diversity on the public lands, the wording here is very restrictive and eliminates the use of any new science, which for example, may include vegetative manipulation for good reason, or the use of introduced species that have been proven to be successful in soil protection or have been established as a viable game species. Other questions are raised by the wording of the amendment including the status of wild horses and burros as being a natural component of the biological diversity of the public lands. As presented this amendment may be more appropriate as a mission statement for the National Park Service. The mission of BLM as stated in FLPMA is not that of the Park Service. This Section was a provision of the 1991 BLM re authorization bill added on the House floor. We suggest the term Biological Diversity first be defined and that further debate be held on the concept.

#### **Additional Amendments.**

Mr. Chairman, although the primary purpose of H.R. 1603 was to re authorize BLM programs, it has become a major legislation in amending FLPMA. The 20 year anniversary of FLPMA will be in 1996. Perhaps now is the time to consider a comprehensive evaluation of the implementation of the law focusing on the future and thus be forward looking. We suggest the formation of a national panel of distinguished citizens of a non partisan nature to carry out such a review ending with recommendations to the Secretary and the Congress.

The Public Lands Foundation suggest the following additional modifications to FLPMA that could be considered by the Committee at this time or by the above review:

#### **Sec. 302 (b) [FLPMA].**

This section of the Act precludes the need for the mining industry to become a part of the land use planning process or for becoming a full participant in any ecosystem management process. We recommend the penultimate sentence of this Section be deleted.

**Sec. 304 (a).**

Public access to public records in this era of electronics is diminished for lack of system modernization and funding. The transformation of public records on to electronic retrievable storage is under way throughout BLM. Access and retrieval could be possible from any place. Funding for system modernization could be achieved through authorizing costs recovery be included in the service fees. Currently only the cost of providing copies of official public land documents is specifically authorized. We recommend an insertion into Section 304 (a) so as to read—"Notwithstanding any other provision of law, the Secretary may establish reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents *including electronic records* relating to public lands and may change and abolish such fees, charges and commissions."

**Other.**

There are several other amendments that would enhance the management of the public land and assist BLM in carrying out its mission. We have previously recommended the following :

- 1) Authorize BLM to use Knudsen-Vandenberg legislation for reforestation.
- 2) Authorize the re-direction of receipts, now going to the Bureau of Reclamation, from sale of vegetative materials from the public lands back to BLM for reforestation and other land management practices.
- 3) Authorize a reforestation trust fund from moneys received from the timber import tax.
- 4) Repeal the Desert Land Act of March 3, 1877 (19 Stat 277).
- 5) Repeal the Carey Act of August 18, 1894 (28 Stat 422).
- 6) Repeal the Indian Allotment Act of February 8, 1877 (24 Stat 389).

Mr. Chairman, we again thank you for this opportunity and your leadership and we hope our views will be of value to your committee in making changes at BLM that will advance public land management.



Mr. VENTO. And we are pleased to welcome Cathy Carlson with the National Wildlife Federation.

### STATEMENT OF CATHY CARLSON

Ms. CARLSON. Thank you. It is a pleasure to be here today. I feel a little like Mr. Synar did a couple of months ago when he was before the committee. And the biennial review of appropriations has taken on the appearance of a regular event like the annual grazing hearing.

The National Wildlife Federation appreciates the Chairman's efforts. We believe it is mainly through your efforts and those of your subcommittee staff person Stan Sloss that we have before us today a strong record in support of reform of BLM programs. Thank you very much for all your efforts in this regard.

NWF is optimistic that this year, with the change in administration and a new Congress, we can bring about new perspectives in the role of Federal agencies and public land management. We look forward to the development of the BLM management issues that are addressed in the BLM reauthorization bill, H.R. 1603.

NWF supports H.R. 1603 and the provisions that form BLM's management, including giving priority to the designation of areas of critical environmental concern, promoting inventory and protection of riparian areas, increasing penalties for violations of the act, and clarifying actions that are subject to judicial review.

I would like to focus my comments today on one of the new provisions in the BLM reauthorization bill that deals with National Conservation Areas.

As we see it, National Conservation Areas have been established to bring national attention to outstanding lands that are administered by BLM. Some of the benefits that come to the land designated as NCAs, or National Conservation Areas, are increased management attention by the BLM, in some cases increased funding for appropriations specifically for that management, and special protection for outstanding resource values.

We agree with the Chairman that standardization is needed in the management of NCAs. And we think Section 19 of the bill takes important steps in that direction. But I would hope that the committee could go further to clarify the meaning of a National Conservation Areas designation.

First, they should be designated on an ecosystem or watershed basis. And I think the committee could give direction to the BLM to provide that the areas that are identified as National Conservation Areas include within their boundaries, at a minimum, watersheds if not a general ecological region. And I think that you see in places like the Gila Box Riparian National Conservation Area a very snake-like boundary that follows right along the riparian habitat. Contrast that with the efforts in the Snake River Birds of Prey bill that includes not just the ecologically unique but the prey-based area for the Birds of Prey but also a fair amount of the ecoregion that is important for the Birds of Prey.

Second, with regard to management prescriptions, we think those management prescriptions for National Conservation Areas need to be spelled out on all public domain lands that are subject to threat or loss through disposal under the land laws, through ap-

plication and mining and mineral leasing statutes, and from livestock grazing.

Section 19 addresses two out of three of these, and we would encourage the Chairman to consider addressing grazing management in NCAs, specifically as part of the overall management guidelines for these areas. We suggest that grazing be allowed to occur only where it is demonstrated it is compatible with National Conservation Area management.

Third, we would like the committee to give direction to land managers to be specific as to the resource values that are significant enough to result in that land being designated as a National Conservation Area.

What we find in the purpose statements in most of the National Conservation Area statutes, which are included as an attachment to my testimony, is that they identify both the specific reasons for the designation in the area as well as broad multi-uses of public lands, and that has resulted in some confusion on the part of the land managers in assigning and trying to balance the resource values out in the development and management plans for these areas.

And perhaps given the debate that we have just heard in the past hour, we should specifically address the scope of R.S. 2477 within the context of National Conservation Areas as well.

I would urge you to give consideration to these remarks. And I appreciate the opportunity to appear here today.

Mr. VENTO. Thank you for your testimony, Ms. Carlson.

[Prepared statement of Ms. Carlson follows:]

Working for the Nature of Tomorrow.



## NATIONAL WILDLIFE FEDERATION

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STATEMENT OF CATHY CARLSON, LEGISLATIVE REPRESENTATIVE,  
PUBLIC LANDS AND ENERGY DIVISION, NATIONAL WILDLIFE FEDERATION  
BEFORE THE  
SUBCOMMITTEE ON NATIONAL PARKS, FORESTS AND PUBLIC LANDS  
COMMITTEE ON NATURAL RESOURCES  
CONCERNING H.R. 1603, REAUTHORIZATION OF APPROPRIATIONS FOR THE  
BUREAU OF LAND MANAGEMENT

MAY 25, 1993

Mr. Chairman. Thank you for the opportunity to present the views of the National Wildlife Federation in our biennial review of the reauthorization of the Bureau of Land Management (BLM). The National Wildlife Federation (NWF) is the nation's largest conservation/education organization, and a national network of affiliated organizations, working to educate and assist individuals and organizations to conserve natural resources, and protect the Earth's environment.

Chairman Vento, you deserve a great deal of credit for your continued interest in the activities of the BLM. It is only through the tireless efforts of you and your staff, Stan Sloss, that there is a strong record of the need for major reforms in the BLM management programs. I thank you for your efforts.

I appear before the Subcommittee today to support H.R. 1603, the Bureau of Land Management Reauthorization Act of 1993. NWF has testified in support of numerous provisions of this bill in the past, which would:

- o give priority to the designation of areas of critical environmental concern;
- o promote inventory and protection of riparian areas;
- o require that BLM personnel below the Director be career employees;
- o increase the penalty for violations of the Act; and
- o clarify BLM actions that are subject to judicial review.

Today, I want to focus my remarks on one of the significant new provisions in the Reauthorization bill; the new standards for National Conservation Areas.

Over the past several years, Congress enacted a number of statutes designating lands administered by the BLM as National Conservation Areas. Attached to my testimony is a brief

summary of the purpose statements and management criteria enacted for several of the National Conservation Areas, as well as provisions that have been proposed in the past two years for the Steens Mountain National Conservation Area and the Snake River Birds of Prey National Conservation Area.

NWF agrees with the Chairman that standardization is needed in the management of National Conservation Areas, to avoid confusion in Congress and among land managers in how these lands should be managed. H.R. 1603 makes significant strides in this direction, by establishing in Sec. 19 that national conservation areas should be:

- o retained in federal ownership, withdrawn from mineral entry and from mineral and geothermal leasing, and not be managed to permit commercial harvesting of timber; and
- o managed for purposes of conserving, protecting and enhancing such resources or values.

In addition, H.R. 1603 calls for national conservation areas to be managed to permit only those uses that further the purposes of the national conservation area.

However, we urge the Chairman to go further to make sure that the management on these conservation areas achieves the purpose intended.

First, some of the land managers involved in developing and implementing plans for the National Conservation Area have expressed desire for a greater level of specificity in describing the management objectives for these areas. When several, often competing land uses are listed in the "purpose statement", the land manager is faced with difficult choices in deciphering Congress' intent in establishment of the area.

Second, the legislation fails to address one of the most significant public lands uses on BLM lands -- livestock grazing. The management of livestock grazing within national conservation area needs to be expressly addressed in any legislation that sets out the management guidelines for these areas. NWF believes that livestock grazing should only be authorized to continue when the BLM can demonstrate that the grazing does not conflict with the purposes for which the conservation area is established. In other words, there should be a presumption against livestock grazing whenever grazing conflicts with the major resource values in the conservation area.

Third, Congress should consider management of these lands on an ecosystem basis, and review the watershed boundaries of the National Conservation Area as the basis for designating lands within the National Conservation Area.

NWF encourages the Committee to adopt these changes when it considers H.R. 1603 - the BLM Reauthorization bill. Thank you for the opportunity to present the views of the National Wildlife Federation on the reauthorization of appropriations for the Bureau of Land Management.



ATTACHMENT  
Recent National Conservation Area Legislation

**EL MALPAIS NATIONAL CONSERVATION AREA**

P.L. 100-225, December 31, 1987

**PURPOSE:** to protect for the benefit and enjoyment of future generations that area in western New Mexico containing the La Ventana Natural Arch and the other unique and nationally important geological, archeological, ecological, cultural, scenic, scientific, and wilderness resources of the public lands surrounding the Grants Lava Flows....

**MANAGEMENT PRESCRIPTIONS:**

**MINING/WITHDRAWAL:** Not specifically addressed.

**GRAZING:** within the conservation area the grazing of livestock shall be permitted to continue, pursuant to applicable federal law....

**WATER RIGHTS:** Congress expressly reserves to the United States the minimum of water required to carry out the purposes for which the ... conservation area ... are designated....

**ACCESS:** Not specifically addressed.

**OTHER:** The Secretary shall permit hunting and trapping within the conservation area in accordance with applicable laws and regulations of the United States and the State of New Mexico [except zones may be created where hunting prohibited].

Collection of green or dead wood for sale or other commercial purposes shall not be permitted in the conservation area.

**SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA**

P.L. 100-696, Nov. 18, 1988

**PURPOSE:** to protect the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands surrounding the San Pedro River in Cochise County, Arizona....

**MANAGEMENT PRESCRIPTIONS:**

**MINING/WITHDRAWAL:** Subject to valid existing rights, all Federal lands within the conservation area are hereby withdrawn from all forms of entry, appropriation or disposal under the public lands laws; from location, entry and patent under the United States mining laws; and from disposition under all laws pertaining to mineral and geothermal leasing and all amendments thereto.

**GRAZING:** Not addressed.

**WATER RIGHTS:** Congress reserves for the purposes of this reservation, a quantity of water sufficient to fulfill the purposes of the San Pedro Riparian National Conservation Area... The Secretary shall file a claim for the quantification of such rights in an appropriate stream adjudication.

**ACCESS:** the use of motorized vehicles in the conservation area shall only be allowed on roads specifically designated for such use as part of the management plan.... The Secretary shall have the power to implement such reasonable limits to visitation and use of the conservation area as he finds appropriate....

**OTHER:**

RED ROCK CANYON NATIONAL CONSERVATION AREA

P.L. 101-621, Nov. 16, 1990

**PURPOSE:** "to conserve, protect and enhance for the benefit and enjoyment of present and future generations the area in southern Nevada containing and surrounding the Red Rock Canyon and the unique and nationally important geologic, archeological, ecological, cultural, scenic, scientific, wildlife, riparian, wilderness, endangered species, and recreation resources of the public lands therein contained....

**MANAGEMENT PRESCRIPTIONS**

**MINING/WITHDRAWAL:** Subject to valid existing rights, all Federal lands within the conservation area and all lands and interests therein which are acquired by the United States after November 16, 1990 for inclusion in the conservation area are withdrawn from all forms of entry, appropriation, or disposal under the public lands laws, from location, entry and patent under the mining laws, and from operation under the mineral leasing and geothermal leasing laws, and all amendments thereto.

**GRAZING:** Not addressed.

**WATER RIGHTS:** Within the conservation area designated by this Act, there is hereby reserved a quantity of water sufficient to fulfill the purposes for which the conservation area is established.

**ACCESS:** Except where needed for administrative or emergency purposes, the use of mechanized vehicles in the conservation area shall be allowed only on roads and trails specifically for such use....

The Secretary may limit the visitation and use of the conservation area....

**OTHER:** The Secretary shall permit hunting within the conservation area (but may designate zones where hunting shall not be permitted)

**GILA BOX RIPARIAN NATIONAL CONSERVATION AREA**

P.L. 101-628, November 28, 1990

**PURPOSE:** "conserve, protect and enhance the riparian and associated areas ... and the aquatic, wildlife, archeological, paleontological, scientific, cultural, recreational, educational, scenic and other resource and value of such areas...."

**MANAGEMENT PRESCRIPTIONS:**

**MINING/WITHDRAWAL:** Subject to valid existing rights, all Federal lands within the conservation area are hereby withdrawn from all forms of entry, appropriation or disposal under the public lands laws; from location, entry and patent under the United States mining laws; and from disposition under all laws pertaining to mineral and geothermal leasing and all amendments thereto.

**GRAZING:** Not addressed.

**WATER RIGHTS:** Congress reserves a quantity of water sufficient to fulfill the purposes ... for which the conservation area is established.

**ACCESS:** Except where needed for administrative purposes or to respond to an emergency, use of motorized vehicles in the conservation area shall be permitted only on roads specifically designated for such use as part of the management plan....

**OTHER**



PROPOSED -- SNAKE RIVER BIRDS OF PREY NATIONAL CONSERVATION AREA

**PURPOSE:** to provide for the conservation, protection, and enhancement of raptor populations and habitats and the natural and environmental resources and values associated therewith, and of the scientific, cultural, and educational resources and values of the public lands in the conservation area.

**MANAGEMENT PRESCRIPTIONS:**

**MINING/WITHDRAWAL:** the Federal lands within the conservation area are hereby withdrawn from all forms of entry, appropriation, or disposal under the public land laws; and from entry, application, and selection under the Act of March 3, 1877 (Ch. 107, 19 Stat. 377, 43 U.S.C. 321 et seq.; commonly referred to as the "Desert Lands Act"), section 4 of the Act of August 18, 1894 (Ch. 301, 28 Stat. 422; 43 U.S.C. 641; commonly referred to as the "Carey Act"), the Act of July 3, 1890 (Ch. 656, 26 Stat. 215; commonly referred to as the "State of Idaho Admissions Act"), section 2275 of the Revised Statutes, as amended (43 U.S.C. 851), and section 2276 of the Revised Statutes, as amended (43 U.S.C. 852).

**GRAZING:** If the Secretary determines that domestic livestock grazing is compatible with the purposes for which the conservation area is established, the Secretary shall permit such use of public lands within the conservation area, to the extent such use of such lands is compatible with such purposes.

**WATER RIGHTS:** The Congress finds that the United States is currently a party in an adjudication of rights to waters of the Snake River, including water rights claimed by the United States on the basis of the reservation of lands for purposes of conservation of fish and wildlife and that consequently there is no need for this Act to effect a reservation by the United States of rights with respect to such waters in order to fulfill the purposes for which the conservation area is established.

Nothing in this Act or any action taken pursuant thereto shall constitute either an expressed or implied reservation of water or water rights for any purpose.

Nothing in this Act shall be construed as effecting a relinquishment or reduction of any of the water rights held or claimed by the United States within the State of Idaho or elsewhere on or before the date of enactment of this Act.

The Secretary and all other officers of the United States shall take all steps necessary to protect all water rights claimed by the United States in the Snake River adjudication now pending in the district court of the State of Idaho in which the United States is joined under section 208 of the Act of July 10, 1952 (66 Stat. 560; 43 U.S.C. 666; commonly referred to as the "McCarran Amendment").

**ACCESS:** the Secretary may provide for visitor use of the public lands in the conservation area to such extent and in such manner as the Secretary considers consistent with the protection of

raptors and raptor habitat, public safety, and the purposes for which the conservation area is established.

**OTHER:** After completion of the ongoing research concerning military use of lands in the Orchard Training Area or after the date 5 years after the date of enactment of this Act, whichever first occurs, the Secretary shall continue to permit military use of such lands, unless the Secretary, on the basis of such research, determines such use is not compatible with the purposes set forth in section 3(a). Any such use thereafter shall be permitted in accordance with the Memorandum of Understanding, which may be extended or renewed by the Secretary so long as such use continues to meet the requirements of subsection (b)(2) of this section.

The Federal Energy Regulatory Commission shall retain its current jurisdiction concerning all aspects of the continued and future operation of hydroelectric facilities, licensed or relicensed under the Federal Power Act (16 U.S.C. 791a et seq.), located within the boundaries of the conservation area.

**PROPOSED -- STEENS MOUNTAIN NATIONAL CONSERVATION AREA**

**PURPOSE:** is to protect the riparian, aquatic, wildlife, archeological, watershed, paleontological, scenic, historic, economic, scientific, cultural, educational, and recreational resources of the public lands....

**MANAGEMENT PRESCRIPTIONS:**

**MINING/WITHDRAWAL:** Not addressed.

**GRAZING:** the grazing of livestock shall be permitted to continue, pursuant to applicable federal law, including this Act, and subject to such reasonable regulation, policies and practices as the Secretary deems necessary.

**WATER RIGHTS:** Not addressed.

**ACCESS:** The use of motorized vehicles in the conservation area may be allowed in areas specifically designated for such use by the management plan developed under section 4.

The Secretary may implement such reasonable limits to visitation and use of the conservation area as he finds appropriate for the protection of the resources of the conservation area, including requiring permits for public use and closing portions of the conservation area to public use.

**OTHER:** The Secretary shall permit hunting, trapping and fishing on lands and waters within the conservation area in accordance with applicable Federal and State law. [Zones where such activities may be prohibited may be authorized.]

Mr. VENTO. And I would invite Nancy Green, of The Wilderness Society to present her testimony at this point. Welcome.

### STATEMENT OF NANCY GREEN

Ms. GREEN. Thank you, Mr. Chairman. I am pleased to be here today. As you may recall, I formerly spent eight years of my career in the BLM as a wildlife biologist. It was a great experience, in California, Colorado, and here in Washington, DC. So I have a great personal interest in the BLM as well as a professional interest.

Mr. Chairman, on behalf of the Society's 300,000 members, I want to thank you for your attention to BLM issues and for your long efforts to get BLM reauthorized. Hopefully this will be the last hearing that we have to have in the House of Representatives on this issue because we will get it passed in the House and then in the Senate.

We believe that H.R. 1603 is an excellent, excellent piece of legislation; and we very strongly support this bill.

Last year, I testified in the Senate on the precursor to this bill, H.R. 1096. And in that testimony, we included summaries of some detailed reports from the Inspector General and the GAO about BLM programs and problems.

Those reports show a very compelling picture of an agency that has largely failed to comply with the key mandates of FLPMA; to manage the public lands on a multi-use basis and in a manner that will protect resource values. And that mandate is well spelled out in FLPMA in Section 102(a).

In the face of the clear problems that exist in BLM's history, their decidedly pro-development bias, we think the amendments to FLPMA that are proposed in H.R. 1603 are, if anything, too limited. And we urge you to provide more direction through FLPMA and that that direction be more specific.

In my written testimony, we have suggested six specific amendments to FLPMA that could be made in the context of H.R. 1603. Today I want to discuss just one of those, which is to strengthen the language concerning National Conservation Areas.

Section 19 of H.R. 1603, we believe, provides an excellent starting point and one that is probably long overdue to guide the future designation and management of National Conservation Areas. The concept of NCAs has been evolving for about 20 years, but to date we have only 7 such areas designated.

The first was King Range NCA in California established in 1970; then the California Desert Conservation Area in 1976; then the Steese NCA in Alaska in 1980. These three early NCAs contained somewhat conflicting mandates to both conserve and develop the resources within the lands affected. And that mixed message has often resulted in inadequate protection and degradation of resources in those areas which Congress clearly intended to protect.

Now, the four NCAs designated more recently have been far more consistent in their legislative mandate and language. We believe they contain some meaningful stands for resource conservation and make it clear that these are not areas where business-as-usual development and use is going to occur.



These four were the El Malpais, the San Pedro Riparian, Red Rock Canyon, and Gila Box NCAs; the latter two enacted in 1990.

And we believe that the concepts and language adopted in those four acts can be used as a basis to strengthen H.R. 1603.

And we would note also that all four of those laws were passed by the House and the Senate with good bipartisan support, and they were signed by Republican presidents. And, consequently, we look forward to good bipartisan support for these provisions in H.R. 1603. There is a good history here.

We have some comments on the general concept of NCAs. First that the lack of legislative standards for NCAs has contributed to the development of a number of NCA legislative proposals that end up providing conservation in not much more than name only, despite the response of resources that probably need and deserve increased protection.

We think the purpose of an NCA is correctly stated in Section 19 and that it should be to conserve, protect, and enhance notable national ecological, scientific, scenic, or cultural resources or values. We are concerned that this purpose not be weakened or confused by conflicting language which fortunately is not in Section 19, but we have certainly seen it in individual NCA bills.

We don't want it to be weakened or confused by conflicting language that establishes various forms of resource or economic development as a stated purpose of the NCA. And we note again that the El Malpais, San Pedro, Red Rock Canyon, and the Gila Box NCA acts all contain relatively clean, unambiguous statements of purpose to make clear that conservation is the purpose of those NCAs.

Further, we agree that NCAs should be more than an attention-grabbing label on a tourist map. I think sometimes it is attractive to get that kind of label to bring economic development or tourism to an area. I think BLM managers sometime see it as a way to get more money, frankly, because they lack the resources they need to manage the public lands.

So that is one reason why legislative standards need to clearly specify how these NCAs will be managed differently and to a higher standard than other public lands which do not have this designation. These NCAs should not be token areas where BLM implements resource conservation practices that, in fact, should be applied agency-wide.

FLPMA already directs BLM to manage for multi-use and to protect the quality of resources on all public lands. So we see NCAs as unique or unusually significant areas that need an added area of protection and that should be spelled out. And NCAs should not be used to avoid the designation of wilderness. If lands qualify for wilderness, they should be designated and managed accordingly.

My recommendations to strengthen the NCA language in H.R. 1603 are as follows: to amend the bill to specifically establish an NCA system. And the seven existing NCAs would automatically become part of that system. It is implied, but we think not directly stated in H.R. 1603. And we would suggest it be specifically stated.

We also strongly recommend adding a new subsection containing management standards. And these should include, but not be limited to, language concerning mining, water rights, vehicle use, and

livestock grazing. We certainly concur with the existing language in Section 19 which makes it clear that NCAs are areas that should be withdrawn from mineral entry and from mineral and geothermal leasing. And we know that this approach is consistent with the mineral withdrawals adopted in all four of the NCAs that have been enacted since 1987.

We also recommend that management standards include an express reservation of a Federal water right that would be sufficient to fulfill the purpose of each NCA. And, again, the four areas designated since 1987 all contain an express reservation of a Federal water right.

The management standards should limit the use of motorized vehicles in NCAs to roads that are specifically designated for such use.

We agree with the National Wildlife Federation's comments about the needs to address grazing also. Grazing should be allowed in NCAs only where it can be shown to further the purposes of conserving, protecting, or enhancing the resource values for which the area is been protected.

And we suggest a clarification of Section 19(b)(1), so the identification of areas that might be suitable for designation as NCAs need not exclude, within that potential NCA boundary, lands that are already designated or proposed for designation as wilderness or wild and scenic rivers.

We think that, as currently expressed, that section of H.R. 1603 implies that no NCAs would include any designated or proposed wilderness areas. And we think that in some areas it may be very appropriate for wilderness or wild and scenic rivers to be part of a larger NCA. And, in fact, I believe that is the case already in the El Malpais NCA area.

Mr. Chairman, again we very much appreciate your attention to BLM issues, and we appreciate the time that has gone into crafting this excellent legislation.

Mr. VENTO. Thank you very much.

[Prepared statement of Ms. Green follows:]



# THE WILDERNESS SOCIETY

## TESTIMONY OF NANCY GREEN THE WILDERNESS SOCIETY

### REGARDING H.R. 1603 BUREAU OF LAND MANAGEMENT REAUTHORIZATION

### BEFORE THE SUBCOMMITTEE ON NATIONAL PARKS, FORESTS and PUBLIC LANDS, of the COMMITTEE ON NATURAL RESOURCES UNITED STATES HOUSE OF REPRESENTATIVES

MAY 25, 1993

Mr. Chairman, I am Nancy Green, Director of the BLM program for The Wilderness Society. The Society is a national conservation organization with 300,000 members, dedicated to the protection and sound management of America's public lands.

I appreciate this opportunity to testify regarding H.R. 1603, the Bureau of Land Management reauthorization bill. Having formerly served nearly eight years in the professional ranks of the BLM as a wildlife biologist in western field offices and in Washington, D.C., I have great personal and professional interest in helping the Bureau achieve its potential for responsible stewardship of the nation's natural resources.

#### Strengthen and Enact H.R. 1603

The Wilderness Society thanks the Chairman for sponsoring this legislation. The required Congressional reauthorization for the BLM is now a decade overdue. Although the House has passed BLM reauthorization bills twice, the Senate has yet to act. Now, in the 103rd Congress, the House is again taking up this important issue under your leadership. We applaud your efforts and hope that the Senate will follow the example set by the House. We believe the land, the agency, and the public deserves action from its elected officials on this long-delayed reauthorization.

The Federal Land Policy and Management Act of 1976 (FLPMA) was landmark legislation, providing policy and guidance for the BLM. H.R. 1603 provides the required reauthorization of funding for programs under FLPMA and also addresses some omissions and weaknesses that have been identified over the past 17 years.

The Wilderness Society strongly supports the enactment of H.R. 1603. Today, we suggest amendments to H.R. 1603 that we believe are necessary to achieve the environmentally sound management of the public lands envisioned under FLPMA. At the core of my testimony today are six recommendations to strengthen the bill.

We note that H.R. 1603 does not directly address livestock grazing on public lands. Comprehensive reform of grazing management is urgently needed. We recognize that this issue is being addressed through separate legislation, including three pending bills: H.R. 643, introduced by Representatives Synar and Regula, primarily concerns grazing fee reform; H.R. 1602, the "Public Rangeland Grazing Reform Act of 1993", introduced by Chairman Vento and Representative Darden; and S. 896, the "Rangeland Restoration Act of 1993." Grazing reform is a critical public lands issue. Our comments on H.R. 1603 do not include amendments to FLPMA regarding grazing, but this is only because the issue is being considered in other pending legislation.

### **Recommendations to Strengthen H.R. 1603**

The amendments to FLPMA contained in H.R. 1603 are reasonable and, if anything, too modest. The Wilderness Society therefore strongly urges the Subcommittee to consider the following recommended amendments to FLPMA that we believe should be made through H.R. 1603.

#### **Recommendation 1:**

##### **Amend FLPMA to ensure the proper protection of ecosystems:**

1. Amend Section 102 of FLPMA to establish that it is the policy of the United States that the public lands be managed in a manner that provides healthy ecosystems which maintain and protect biological diversity, including viable populations of plants and animals distributed throughout their natural geographic range. A viable population is defined as one which has the estimated numbers and distribution of reproductive individuals to provide a high degree of assurance that its continued existence is well distributed in the planning area.

2. Amend Section 202(c) of FLPMA, concerning the development and revision of land use plans, to include direction that in the preparation of these plans the Secretary shall provide for the diversity of plant and animal communities, including the maintenance of viable populations of existing native and desired non-native species in the planning area.

Adoption of this recommendation will bring BLM policy and management into line with modern principles of ecology. Properly functioning ecosystems, including the biological diversity they support, are important to the health and well-being of all Americans. The time for the BLM to manage the public's land in a manner that protects ecosystems is long overdue.

Adoption of our proposal also will help produce much more sensible and coordinated land management of resources across federal agencies. As we have learned



in the ancient forests of the Pacific Northwest where BLM and Forest Service lands are adjacent and inextricably linked, ecosystems do not recognize administrative boundaries. The public will be better served if the BLM and other federal land management agencies significantly improve coordination of their activities to protect ecosystem values. Our proposal will bring BLM policy and management into a more consistent position with existing policy governing the second-largest federal land management agency, the U.S. Forest Service, as established in the National Forest Management Act of 1976.

Numerous reports by the General Accounting Office and by BLM's own documents reveal a sorry picture of much of our public lands. It is a picture of stripped riparian zones; cold-water streams turned tepid, muddy and even sterile by inappropriate levels of grazing and mining that have destroyed native fisheries and aquatic life; and threatened species such as the desert tortoise, pushed to the brink by livestock with which it cannot compete. The number of BLM "species of concern", which includes threatened and endangered species plus others at risk, demonstrates that we are losing much of our natural species diversity on BLM lands under present management. Our proposed amendment, properly implemented, will help reduce the need for listing species under the Endangered Species Act because it will require management for viable population levels.

Section 18 of H.R. 1603 provides a starting point for addressing these concerns by amending Sec. 302(a) of FLPMA with the addition of "natural productive capacity" and "native species and communities" to the management standards for BLM. We support this provision in H. R. 1603 and our recommended amendments support and strengthen it by establishing ecosystem protection as a matter of policy and planning direction.

#### **Recommendation 2:**

**Amend Section 102 of FLPMA to establish that it is the policy of the United States that the public lands be managed in a manner that protects or enhances the resources and values of conservation system units.**

This complements our first recommendation regarding ecosystem-based management. It also supports Section 3 of H.R. 1603, which refines the FLPMA definition of "areas of critical environmental concern" and provides a definition of "conservation system unit". These changes will result in more sensible management decisions so that activities permitted by the BLM will not degrade the resource values of adjacent or nearby national parks, monuments, wildlife refuges, designated wilderness areas, or other conservation system units as defined in H.R. 1603.

#### **Recommendation 3:**

**Amend Section 14 of H.R. 1603 to strengthen the existing text to direct the Secretary to consider all asserted or proposed rights-of-way across public lands only in accordance with the provisions of Title V of FLPMA, and, if appropriate, Title XI of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA).**

Section 14 of H.R. 1603 deals with a threat to some of America's most spectacular wildlands. That threat is Revised Statute 2477, a product of the Mining Law of 1866. RS 2477 simply states, "the right of way for construction of highways over public lands, not reserved to public uses, is hereby granted." Intended to give miners access to their claims, it helped in the give-away of public lands that was the order of the day.

Although RS 2477 was repealed by FLPMA, the Interior Department recognized "grandfathered" rights. For several years the Department has operated under a very lax and inadequate policy, articulated under former Secretary Donald Hodel, for determining the validity of assertions for rights-of-way under RS 2477. The Hodel policy is so flawed that successful claimants can turn old footpaths, dogsled trails, or wagon trails into major roads or highways through our western national parks, national wildlife refuges and BLM wilderness study areas.

Section 14 of H.R. 1603 contains the identical language adopted by the House when it passed the predecessor of this bill, H.R. 1096, in 1991. Since then, there has been an explosion of claims for rights-of-way under RS 2477. There can be no doubt that these claims are an attempt to end-run likely Congressional or Administration action on this matter.

In Utah, approximately 3,800 separate rights-of-way have been asserted during the past two years under RS 2477; these assertions are still pending with BLM. They include asserted rights-of-way across units of the national park system and BLM wilderness study areas. In Alaska, the State filed regulations in 1992 to expedite claims for 1,400 to 1,700 rights-of-way under RS 2477. If these claims are accepted as valid by the Department of the Interior, mere dogsled trails could become highways across the 13 national parks and 16 national wildlife refuges protected by ANILCA, and the pristine public lands in Alaska's remote interior would be opened up to large-scale resource exploitation.

Rather than having a separate process for determining the validity of RS 2477 claims -- a process that does not include the environmental review process of the National Environmental Policy Act -- it would be far more appropriate to simply process all such claims under the standard procedures already provided for in FLPMA and, in the case of Alaska, ANILCA. We are eager to review the new study of the RS 2477 situation, and options for dealing with it, being prepared by the Interior Department as requested in the conference report on the FY 1993 Interior Appropriations Act.

Testimony provided today by Southern Utah Wilderness Alliance and the National Parks and Conservation Association addresses the RS 2477 issue in detail. The Wilderness Society concurs with the testimony of these organizations.

#### **Recommendation 4:**

**Section 705 of FLPMA should be amended to repeal the Act of August 28, 1937 (commonly known as the Oregon and California Grant Lands Act) and the Act of May 24, 1939 (commonly known as the Coos Bay Wagon Road Grant Lands Act).**

The two acts that we propose be repealed are products of a bygone age when timber production was given priority over all other uses of the forested public lands of western Oregon. These are not multiple use laws: under Section 701(b) of FLPMA, these outdated laws prevail over FLPMA in cases of conflict over timber resources.

In part as a result of the O&C Act, the BLM has severely overcut its forested lands and largely ignored the consequences for species such as the threatened spotted owl, the marbled murrelet, and the numerous populations of fish stocks at risk, including many of great economic value to the commercial fishing industry. We hope that the new Administration's proposal will produce a coordinated, interagency plan which provides meaningful protection to the last of America's ancient forests and resolves this issue.

The two laws that we propose for repeal are totally inconsistent with modern scientific, professional and public values concerning ecologically sustainable and balanced land management. Repealing them will end any potential confusion about conflicting mandates and will bring the BLM forest lands of western Oregon completely under the provisions of FLPMA.

**Recommendation 5:**

**Amend Section 603 of FLPMA to provide interim withdrawal of land in Wilderness Study Areas from appropriation under the mining laws.**

Section 603(c) of FLPMA requires the Secretary of the Interior to protect wilderness study areas (WSAs) until Congress decides which ones to designate as wilderness. Specifically referring to WSAs, Section 603(c) states: "... the Secretary shall ... take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection."

Despite this requirement for interim protection, WSAs remain open to new mining claims. In all likelihood it will be many years before Congress makes its final decisions on all BLM wilderness designations. Additional mining claims only set up additional conflicts over wilderness designations. Our recommended temporary mineral withdrawal will eliminate additional potential conflicts between wilderness and mining.

**Recommendation 6:**

**Strengthen the provisions of H.R. 1603 concerning National Conservation Areas.**

We strongly support Section 19 of H.R. 1603, which provides an excellent starting point for a legislative framework to guide the future designation and management of National Conservation Areas (NCAs). We previously have testified before this Subcommittee concerning various NCA proposals and the need for this type of "generic" legislation so that designations and management will provide meaningful protection.

Although the NCA concept has been evolving for more than 20 years, only a handful of such areas have been designated to date. The first was the King Range National Conservation Area in California, established by Congress in 1970 (P.L. 91-476).

The California Desert NCA was designated in 1976 as part of FLPMA (P. L. 94-579). The Steese NCA in Alaska was designated in 1980 as part of ANILCA (P.L. 96-487).

These early NCAs contain somewhat conflicting mandates to both conserve and develop the resources contained within them. This "mixed message" often has resulted in inadequate protection. The resource degradation resulting from conflicting statements of purpose and management direction is most clearly seen in the California Desert Conservation Area, where permitted uses on public lands are oriented toward environmentally damaging activities such as hardrock mining and extensive off-road vehicle use.

Four NCAs designated more recently have been far more consistent in their legislative mandate and have meaningful standards for resource conservation, rather than business-as-usual development and use. These four areas are: the El Malpais NCA established in 1987 (P.L. 100-225); the San Pedro Riparian NCA designated in 1988 (P.L. 100-696); and the Red Rock Canyon NCA (P.L. 101-621) and the Gila Box Riparian NCA (P.L. 101-628), both established in 1990. The laws establishing these areas contain language and concepts that can be used as the basis for management standards in H.R. 1603.

As a backdrop for our suggestions to strengthen H.R. 1603, we offer the following comments on the general concept of National Conservation Areas:

- o The lack of legislative standards for the identification and management of NCAs, coupled with the absence of any BLM policy on NCA management, has contributed to the development of NCA proposals that provide conservation in little more than name only, despite the presence of resources that need and deserve increased protection.
- o The purpose of an NCA should be to conserve, protect, and enhance notable natural, environmental, ecological, scientific, scenic, or cultural resources or values. The NCA definition in Section 19 of H.R. 1603 is consistent with this approach. This purpose should not be weakened or confused by other, conflicting language that establishes various forms of resource or economic development as a purpose for such designation. We note that the El Malpais, San Pedro, Red Rock Canyon, and Gila Box NCA Acts all contain unambiguous statements of purpose, making it clear that resource conservation is the purpose for the designation of these NCAs.
- o A National Conservation Area should be more than an attention-grabbing label on a tourist map. Some of the legislative proposals for individual NCAs that we have reviewed in recent years have appeared primarily to be attempts to re-name a portion of the public lands as an NCA without making any significant changes in management. Legislative standards are needed which clearly specify how the lands will be managed differently, and to a higher conservation standard, than other public lands which lack such a designation.



- o NCAs should not be token areas where BLM implements resource conservation practices that in fact should be applied agency-wide. FLPMA directs the BLM to manage for multiple use and to protect the quality of resources on all public land. Areas with unique and/or unusually significant values should receive an added measure of protection through designations such as NCAs, Wilderness, and Wild and Scenic Rivers.
- o NCAs should not be used as an excuse to avoid the designation of wilderness. In discussions with BLM managers in several states, it has been clear to us that many of them are proposing NCAs as a defensive "cover" for efforts to maintain "business as usual" to the greatest extent possible in areas where they oppose wilderness designations. If the lands qualify for wilderness, they should be designated and managed accordingly.

H.R. 1603 provides a definition of National Conservation Areas, gives direction for the Secretary to identify potential NCAs and report to Congress regarding such areas and recommended management requirements. We urge the Committee to amend the bill to specifically establish a National Conservation Area System. The seven existing areas would automatically become portions of the system.

We further recommend amending Section 19 of H.R. 1603 to add a new subsection containing management standards for the NCA units. The management standards should include, but not limited to, language concerning mining, water rights, vehicle use, and livestock grazing in NCAs.

We concur with the existing language in Section 19 making it clear that NCAs are areas that should be withdrawn from mineral entry and from mineral and geothermal leasing. This approach, which is consistent with withdrawals adopted in all four NCAs designated since 1987, should be established as a management requirement. Mining and geothermal activities are incompatible with the goal of conserving areas with notable natural, environmental, ecological, scientific, scenic, or cultural resources or values.

We also recommend that the management standards include an express reservation of a federal water right sufficient to fulfill the purposes for which each NCA is designated. The laws designating the El Malpais, San Pedro, Red Rock Canyon, and Gila Box NCAs all contain an express reservation of a federal water right. The Wilderness Society has long held the position that a reservation of federal land -- be it wilderness, a national wildlife refuge, national park, or other designation -- should carry with it a reservation of water sufficient to fulfill the purposes for which the area was established.

The management standards should limit the use of motorized vehicles to roads specifically designated for such use. Also, motorized vehicles should be allowed only in areas where such use does not conflict with the purpose of conservation and protection of the area's resources.

It is difficult to imagine that livestock grazing will be compatible with conservation and enhancement of resources in NCAs. Grazing should be allowed in NCAs only where it can be shown to further the purposes of conserving, protecting, and enhancing the resources or values for which the area is designated.

Finally, we also recommend an amendment to Section 19(b)(1) to clarify that the identification of areas that may be suitable for designation as NCAs need not exclude, within the proposed boundary, areas already designated or proposed for designation as wilderness or wild and scenic rivers. As currently expressed, this section implies that no NCAs would include any designated or proposed wilderness areas. We believe that in some areas, it may be appropriate for wilderness, as wild and scenic rivers, to be designated as part of a larger NCA.

### **Conclusion**

Mr. Chairman, we very much appreciate the time and attention that has gone into crafting this excellent legislation. Thank you for considering our recommendations concerning H.R. 1603; we look forward to working with you and others to strengthen and enact it.

## STATEMENT OF CONSTANCE E. BROOKS, ESQ.

Mr. VENTO. And finally we have Connie Brooks from Denver, Colorado.

Ms. BROOKS. Thank you, Mr. Chairman. I am going to try to stick with my five minutes precisely. I haven't timed it, so I may cut myself short.

I am a private practitioner. Fifty percent of my practice concerns livestock grazing. The rest of it tends to be a mishmash of Endangered Species Act, environmental, and rights-of-way issues. Today, I wanted to talk about a couple of issues separate from my written testimony that no one else has talked about today. And I would like to focus on the changes in the Bureau of Land Management's mission proposed in H.R. 1603 and focus on the changes in State and fish and wildlife management jurisdiction.

First of all, I think it is important to keep in mind that the Bureau of Land Management lands, what we call the public lands, constitute the last chunk of Federal land that is available consistently for rights-of-way, power lines, natural gas pipelines, livestock grazing and mineral development. They are concentrated in the 16 western States. If we focus on specific counties, we find there are some counties in Arizona that have less than 5 percent private land base.

When this committee looks at the impacts of this bill and the consequences, I would urge that it look at it on a county-wide basis. Specifically in working with one livestock rancher in the State of Idaho, we looked at the economic contribution—this was done by the University of Idaho—we looked at this one operation's contribution to the county and he was stunned because it came to \$900,000. This is just one operator.

If you look at the role in the county agriculture, as opposed to the national role or the national meat market, all of a sudden it has a very real impact. Focusing on that, let's look at the new sort of focus of the BLM to manage BLM land for its natural productive capacity.

I participated for 18 long months in the keystone biological diversity dialogue. We couldn't agree on how to define or how to instruct agencies to manage for biological diversity. Our compromise was that the agencies stick with their existing statutory mechanisms, and we focused quite a bit on the Bureau of Land Management. Natural productive capacity was not a term we used or discussed. It implied, by use of the word "natural," that we want to go back to what was an original state. It is not defined in the statute. It is going to be very difficult to implement.

In working with this issue, we found it very difficult to define what we believed was the historical condition for much of the land. And I remember being involved in a case in southeastern Arizona very recently and work done by very highly regarded botanists on the conversion of certain range land habitat from perennial to annual species is not necessarily due solely to livestock grazing but, in fact, lengthy periods of draught. The changes in the climate are believed to also have worked tremendous change.

Does this bill want to go back to some prior stage in 1890? We need to define that. I would suggest to the committee that it is going to be extremely difficult to define, what with the natural ca-

capacity of any particular area. It will vary widely by geology, climate, altitude, rainfall. It is not just a user issue by any means. It is a very difficult one to apply.

We look at the criteria for long-term sustainability in this bill and it is to be measured by the variety of native plant and animal communities. It has been briefly mentioned earlier that there are a number of introduced species that play an important role in fish and wildlife populations that we know today. You compare H.R. 1603 with the Forest Service, who manage for a variety of plant and animal varieties, and we have a different standard.

The Forest Service doesn't intend to go back to a prior date. It includes native and nonnative species, because nonnative species are not necessarily detrimental or superior. They change the ecosystem. That is correct. Everything has an effect. But it is not necessarily negative.

Alpaca have been introduced, as have big horn sheep. They are not native. They play an important role. They are not adverse to the environment. Wild horses in large populations are descendants from strays. They are a nonnative species. This is issue that in the bill is going to be very, very difficult to regulate. These issues need to be addressed.

One final point, and it is actually very important. This bill proposes to require the BLM to manage fish and wildlife populations. Historically through State constitutions approved by the Congress, the Federal Government does not manage fish and wildlife population, it manages the habitat. By moving from habitat to populations, you are disturbing a delicate balance. And it is a difficult issue now. It is a very difficult regulatory issue, because the State fish and game agencies may be producing more elk because there is a demand for more elk. They may want a larger antelope herd. The herd is going to spend 75 percent of its time on Federal land. It is a delicate issue.

By changing the phrase to "fish and wildlife populations," you are moving into an area that I think it would be useful for this committee to talk about with the State fish and game agencies. It is important to communicate with them. Set up mechanisms for better coordination. It is a very, very sensitive issue. And I am unaware of any broad-based study that concludes that the current system does not work well.

I know in many cases State fish and game agencies have acted faster than the Federal agencies to protect certain species. There is always a push and shove. But I would suggest that this be addressed because, again, it is a very important issue.

As someone who represents public land users, I will be very concerned about the expansion of national conservation areas without first asking the question: Do we want to create a new system? Is there revenue to manage the new system? Do we have the revenue to create it, evaluate it, and then run it? And if you are reducing the base for mineral development, if you are moving more and more livestock operators off of Federal lands, you are going to have less revenue generated from the Federal lands from the beginning.

I think this committee wants to look at whether or not there is, in fact, the money to support a new land management system. What role would this national conservation area system serve that



is not already served through wilderness or national parks? These are important questions.

And as an aside, I understand that the Steese Mountain National Conservation Area sent a mixed message for the reason that it was a compromise. I had the pleasure of working to get that proposal adopted and my client was a mining company that needed to be able to mine what was otherwise a national monument. These areas were considered compromise measures where certain protection could be provided.

I understand that you may want that concept to evolve. I think it is important also to ask ourselves what special role will national conservation areas serve that cannot already be served by other designations.

And finally in the areas of critical environmental concern, I remain very worried as a practitioner that areas of critical and environmental concern may be designated solely for purposes of stopping livestock grazing and stopping mining. I have been involved in specific appeals where we have been able to prove that livestock grazing was not contrary to areas of the critical environmental concern and we have been able to persuade the BLM to adjust.

But that is a heavy burden. Hiring a lawyer and hiring the range and biological experts to show to the contrary is a significant investment that would be placed on an individual livestock operator.

I would urge this committee not to permit that to occur; let areas of critical environmental concern be those specific areas that are worthy of attention within the existing land use management system.

Thank you.

Mr. VENTO. Thank you, Ms. Brooks.

[Prepared statement of Ms. Brooks follows:]

Before the Subcommittee on Public Lands, National Parks and Forests  
of the  
Committee on Natural Resources  
In the House of Representatives

Hearing on H.R. 1603

Testimony of  
Constance E. Brooks  
May 25, 1993

Mr. Chairman, I appreciate the chance to testify before this Committee on HR 1603. The issues raised in the bill are important to the nation and to the people living in the western states. I am a private practitioner, who has worked in the public land law area for more than 16 years. As a lawyer for ranchers, mining companies and oil and gas concerns, I am familiar with the operation of the Federal Land Policy and Management Act. HR 1603 goes beyond re-authorization of the Bureau of Land Management (BLM) by dramatically changing the agency's mission and redefining the role of public lands, as opposed to specific conservation system units.

Today I will focus on the following key points in HR 1603:

- Change in Public Land Management Focus and Criteria;
- Superseding State Fish and Wildlife Management Jurisdiction;
- Expansion of National Conservation Areas; and
- Expansion of Areas of Critical Environmental Concern.

**I. BLM Land Management Mission.**

HR 1603 would change the BLM's land management mission in several critical ways. The sum of these changes is to diminish its multiple use mission to the detriment of the communities and states that rely on these lands for revenue and economic support.

While BLM manages more than 280 million acres of land, the vast majority of that land is located in a handful of western states. For instance the states of Idaho, Nevada, Arizona, and Utah are all more than 60 percent federally owned. There are many counties in these western states that have as little as 5 or 10 percent of their land base in private ownership. The rest is owned by the federal government and much of it is managed for multiple uses by the BLM. The changes proposed in HR 1603 will have a dramatic and immediate effect on the community stability in these western counties.

BLM lands remain the last large block of truly multiple use federal lands. Mining, oil and gas leasing, rights of way for natural gas pipelines or electrical power, and livestock grazing can and do occur routinely on these lands. Congress has already set aside millions of acres for preservation in the National Park System and the National Wildlife Refuge System. Areas set aside for specifically for recreation include National Recreation Areas, National Seashore Areas, National Trails, and Wild and Scenic Rivers Systems. The scenic and roadless qualities of the National Forests and the BLM public lands are also protected from development as part of the National Wilderness Preservation System.

Section 8 changes the standard for land use on BLM land from "undue and unnecessary degradation" to "undue degradation" with minimal environmental impacts. This is a standard that will be very difficult for minerals activities or other long-term activities to meet. The difference between the current law and the bill's language suggests that the standard will be much like that for activities in an area preserved for wilderness or wilderness study. This may preclude permanent uses, such as roads or recreation facilities, as well as uses that have major impacts. Because the law does not address how BLM might handle activities having something more than a minimal environmental impact, the implication is that such activities would be prohibited. Uses that we take for granted like electrical power lines and pipelines might be limited or precluded, because the impacts cannot be said to be minimal.

Section 18 would require the BLM to manage the land so as to restore it to its "natural productive capacity." This phrase raises two major problems: there is no accepted definition of "natural productive capacity" and the law does not address capacity to produce what.

The term natural productive capacity implies an objective of returning public lands to some original or natural condition. However, there is no widely accepted and scientifically established definition of the natural condition of these public lands. For instance, we often hear that western rangelands were endless fields of tall grasses. This description might apply to only small percent of the rangeland. Historical research suggests that the plants and shrubs on the western rangelands varied widely depending on soil, altitude, rainfall, and weather conditions. In a number of instances, the rangeland is in better condition now than it was in its "natural" state. There is no complete history and thus it is difficult to conclude what is the baseline for natural productive capacity.

Even if the issue is limited to native plant species, well regarded botanists hotly dispute the role of drought, versus early agriculture uses, on the change in plant species. The notion of natural productive capacity is not a clear-cut issue and it is a standard that does not exist at the present time. Asking the BLM to implement such a standard will set in motion a regulatory nightmare.

Even if there was a widely-accepted definition of natural productive capacity, the next question is to produce what? It is not possible to manage every acre of land for

all species. We must first define the management objective, before it is possible to measure natural productive capacity. Habitat management conflicts are numerous. Should the BLM emphasize habitat for big game or raptors, or brush dependent species. The habitat management conflicts with the northern goshawk and the wild turkey in northern Arizona illustrate this issue. Managing the forest for late seral forest habitat for raptors will limit the open meadow and brush habitat for wild turkeys and deer. Meeting the area's "natural productive capacity" for trees will reduce the capacity for open meadows. Managing for the natural productive capacity cannot be defined without reference to specific land management objectives.

HR 1603 also would have the BLM manage for long-term sustainability of native plant and animal communities. Here again, there is no well-established definition of what is a "native plant and animal communities." Elk, deer, and big horn sheep have all be introduced into areas where they are not native. In northern Arizona, the elk has been there so long that most people would believe it is native, when it is not.

HR 1603 appears to assume that native species are superior to non-native species. In some cases this is true and in other cases, the answer is not that simple. Many sport fish introduced into the nation's streams are non-native and may even prey on native fish. However, these fish are widely enjoyed.

HR 1603 also fails to define or explain "long-term sustainability." The bill would measure "long term sustainability" by the variety of native species and communities. Here again, we must ask the question, measured against what? The question of what variety of grass and brush species might have grown in one area of Utah is one that is unproven and possibly unprovable. The question of why the variety has decreased cannot be attributed solely to development. This is even more true when we deal with larger animals, such as raptors and mammals. We cannot ask a federal agency to adopt these criteria for management when they cannot be and are not defined.

HR 1603 differs materially from the U.S. Forest Service objective of providing for a variety of plant and animal communities. The Forest Service is limited to the present time, as opposed to a theoretical potential or historical production and includes both native and non-native species. There is no mandate that precludes an activity, if the objective cannot be achieved. HR 1603 would preclude any action if it is found to "diminish" the long-term sustainability and imposes management criteria that are not currently defined.

## **II. Superseding The Role of State Fish and Wildlife Regulation.**

HR 1603 appears to supplant the role of the state fish and game agencies without any findings or analysis that the state management of fish and wildlife populations is inadequate. Under many western state constitutions, the states are assured the right to regulate the take of fish and wildlife populations. Under current federal law, this is respected by virtue of the fact that the federal government manages the habitat but the



states manage the fish and wildlife populations. HR 1603 would change this constitutional tradition.

Federal management of fish and wildlife populations would dramatically affect state fish and game management. Both agencies would be trying to manage the same populations. Since fish and wildlife are unaware of the political boundaries, there would be significant opportunities for conflict and confusion.

The changes being proposed are not based on any evidence or suggestion that the state agencies have mismanaged their programs. HR 1603 does not even offer a role to state agencies and purports to supersede the role now being played. Without more testimony and analysis, there is no record to support such a change.

### III. National Conservation Areas.

The proposed legislation would require a review and evaluation of all BLM lands to determine their suitability for inclusion in conservation units called National Conservation Areas. These areas are in addition to the other conservation systems, such as parks, refuges, forests, and wilderness areas to name a few. Simple mathematics tells us that there will be very little public land available for multiple use and sustained yield management where livestock grazing, mining, oil and gas leasing, and other commercial uses can occur.

The bill mandates a major new system and, thus, a new program that will require new employees and significantly more money. Even before these units are adopted by Congress, BLM will need more employees to inventory and evaluate the lands, write reports, and handle the public comment. HR 1603 proposal to expand the National Conservation Area System will create a new bureaucracy to manage the land without a revenue base to support it.

Before Congress takes this step, it needs to consider whether expanding and changing the National Conservation Area System is necessary. The first National Conservation Area was the California Desert Conservation Area, where mining, grazing, and other uses are permitted. Other National Conservation Areas have the same multiple use mandate, subject to some specific purposes. HR 1603 would change that by adopting a mandate that prohibits these uses. There is no evidence suggesting that National Conservation Areas, as opposed to the already existing designations are warranted. This is especially true since the HR 1603 National Conservation Area mandate cannot be distinguished from that for the National Parks or wilderness.

Carving a new set of conservation units from BLM lands will reduce the productive and revenue generating land base significantly. It will also concentrate the commercial or consumptive uses on a smaller land base, thereby increasing the environmental impacts. There is no countervailing revenue base that will fund this new

system.

Under HR 1603, these new National Conservation Areas would be closed to mining, oil and gas leasing, and presumably livestock grazing. The social and economic impacts would be very significant. First the revenues from leasing and grazing would no longer be paid to the states and counties. The money generated from mineral development and agriculture would also drop to a trickle. The impacts would be felt by local banks, equipment salesmen, and the local grocer. Experience in other rural areas shows that tourism with minimal wage and seasonal employment is not a viable substitute for agriculture or mineral development.

The Committee must address the role of agriculture in a single county, which is mostly federal land. For instance, one client's federal allotment and ranch operation represents \$900,000 a year to the county economy. This is not atypical and is an important perspective rarely addressed in the public lands debate.

Nor is it fair to assume that such conservation units will only have rural or special interest impacts. Such designation will limit or preclude water projects and water development that is critical to supplying the growing urban areas in the West.

#### **IV. Areas of Critical Environmental Concern.**

Expanding the use of Areas of Critical Environmental Concern as a protection mechanism raises the same concerns as expanding the number and scope of National Conservation Areas. Areas of Critical Environmental Concern were originally identified to provide special management for a particular resource or value. Now we see areas exceeding 120,000 acres. The size and diversity preclude special management for the entire area. Indeed, these areas have become a new conservation system unit disguised as an Area of Critical Environmental Concern.

In recent years, Areas of Critical Environmental Concern are identified for the express purpose of preventing livestock grazing or mining. In one area, the ostensible purpose was to protect the riparian areas, but more than two-thirds of the land in the Area of Critical Environmental Concern was uplands indeed much of the land included uplands that were in good range condition and supported other wildlife not in need of special management. This bill will only permit additional abuses of the Areas of Critical Environmental Concern and again diminish the land base available for multiple uses.

The added purposes in HR 1603 for an Area of Critical Environmental Concern only support this concern. HR 1603 seeks to protect the areas from uses, not to manage the resources or values. The redefined Area of Critical Environmental Concern is only a mechanism to prevent multiple uses, not to necessarily enhance management for a unique plant or species of animal.

**V. Conclusion.**

There is no question that BLM needs to be re-authorized. There are a number of provisions in HR 1603 which merit enactment. However, the bill tries to do too much without justification.

Mr. VENTO. Obviously, we do change some words in the bill, but I think you have to look at the Organic Act as well, which I know you have done. But it would give the same definition.

You said in your testimony that you felt that the BLM's traditional role with regards to fish and wildlife had been to deal with habitat. As a matter of fact, the change in the language actually speaks to the plant communities and habitats, specifically, whereas the previous language might have led to the conclusion that you suggest that we are interfering with fish and game.

There is no authority here to in any way interfere with fish and game management by the States.

If you look at the language, I have the language before me, that in fact the current language of FLPMA talks about fish and wildlife development and utilization. That is the current language, which would, in fact, probably be more likely to lead to, if there was going to be any risk of leading to the national government managing fish and wildlife. But that is of course just looking at that particular phrase and not the entire tradition of BLM and of the entire statute.

But I would submit the changes that are proposed, if anything, are consistent and they are probably made along those lines because of the exchange before Members. So we have studied this very carefully. And I believe that your testimony simply does not move me along those lines.

Ms. BROOKS. Well, I am glad to hear that. I was relying on the description in Section 4 that used the word "population" that hadn't been used before. And if that is not intended to manage populations, then that is very good.

Mr. VENTO. The population obviously is a factor in terms of what the carrying capacity and so forth would be, but just looking at the habitat management, the current law also contained the word "production" and in fact "utilization", which must mean utilization of populations, so we are trying to clarify what the rule is and focus on the broader habitat concept.

Obviously, when you talked about management with regards to what the natural carrying capacity would be, that is exactly what BLM does. So we looked at these as cosmetic changes, better explaining the role of BLM.

Mr. Lea, regarding your concerns about Section 18 and of others that have expressed concerns about that—this was adopted on the Floor of the House. It was an amendment by Congressman Jontz. In the last Congress or two, we have had a lot of people that resisted in the committee the whole concept of biological diversity and ecosystem management. We were sort of challenged that we don't have definitions. Not unlike, I guess, the conversation and debate that Ms. Brooks had with her groups in terms of trying to determine what these words mean.

But in any case I think that Mr. Jontz, if I may say so, was attempting to anticipate that sort of criticism of the amendment and so used this rather different language which obviously doesn't embrace the latest biological ecosystem type of approach in terms of management. But we would be open to review that to see if we can attain agreement with regards to it.



In your statement, Ms. Brooks, you say that there are a number of provisions in H.R. 1603 which merit enactment. Which portions were you referring to?

Ms. BROOKS. Well, at the risk of getting myself in trouble—

Mr. VENTO. You won't be in trouble with me, Ms. Brooks.

Ms. BROOKS. I think I will. I think it is important to reauthorize BLM. They are functioning without it. At the risk of getting myself in trouble, I thought the judicial review section was just fine.

Mr. VENTO. The what section?

Ms. BROOKS. Judicial review.

Mr. VENTO. I don't have any objections to it. We wrote it.

Ms. BROOKS. It was criticized earlier, but by reaching back into what the administration requirements are and the issues of finality and so forth under the administrative procedure account, I think it is nice to get a clear-cut right of judicial review. The Supreme Court has kind of solved it, but every once in a while you find yourself defending the right of judicial review in a FLPMA case. And it is nice to see that, yes, we do have a right of judicial review.

It is good to ensure the professional qualifications for the BLM employees. In my experience, they have all been civil service, but I know that people get very goosey when there are changes in administration, and it is always nice to know that you are going to be respected for your professional job. I think that is also important.

Those are basically the ones that I thought were the most important.

Mr. VENTO. Well, of course getting rid of the one-House veto, which is now unconstitutional, would probably be good to clean up the law. You do have some problems apparently with the recordation of rights-of-way?

Ms. BROOKS. Well, I think the issue needs to be resolved and I agree with both the Chairman and many of the witnesses earlier that the R.S. 2477 issue needs to be resolved. I thought the bill as proposed is relatively complicated. I think extension of a period of time would be appropriate. I think there are going to be a lot of entities, a lot of poorer counties and poorer communities that are not going to be able to take a matter through appeal if their particular rights-of-way are denied.

I think it is very good to give people an opportunity to prove it. My experience with R.S. 2477 rights-of-way is that it is extremely difficult to prove some of them where the county has sort of haphazardly maintained the road. They never abandoned it. On the other hand, they haven't actively maintained it, like plowing it for snow in the last 10 years. Everyone is looking at it. It looks like a dedicated right-of-way. It smells like one, but if you had to go in court and say, yes, your Honor, this meets continuous use by the public and the county has accepted responsibility, often that second aspect—the county accepting responsibility—is really unclear.

They may have accepted responsibility in 1948. They may have decided it was too much money in 1955, so they stopped maintaining it, but people still use it and maybe they resumed some maintenance work. It is very expensive to go back and try to interview witnesses and dig up that information. And I think it is very important to provide a mechanism, but I think this committee needs

to be aware it is going to be an expensive mechanism and a time-consuming one and it is not going to be unlike the mining claim and recordation requirement in 1976.

The counties with the money are going to get the recordation. They are going to figure out how to do it and they are going to do it. I think you are going to find the poorer communities are going to be left standing. Maybe that is the way it has to be.

Mr. VENTO. I don't know what the alternative is. I hear your concerns and obviously this is modeled on the 1976 Act's treatment of mining claims. The universe is presumably limited to public entities and so that limits it to some extent. We don't actually do that in law. We put any entity, but the truth of the matter is that it becomes any public entity.

We don't want to presume to foreclose on those that want to initiate this in the absence of a county board of commissioners' action. But I think the universe is more limited. So I don't know what else to do, short of telling the BLM what administrative procedures they will use, as we have done with some modicum of providing assurance on both the side of the applicant and those that might want to challenge the application, and then to provide judicial review. So we get accused of having a two-tiered judicial system.

If you have findings of fact in dispute, you take it before an administrative law judge. On the surface it sounds fair. Obviously we are trying to deal with the small percentage of these which I think would be controversial. But it does require, from a prudent standpoint of management of 280 million acres of land, to have outstanding claims that were initiated between 1866 and 1976, then to say we are actually going to run it if we don't prove up what the rights-of-way claims are on access. I think it is ridiculous.

It is a problem, but it is one really that was created by not extinguishing those rights earlier.

Ms. BROOKS. I absolutely agree and I am not saying that this is an easy one or that I have all the answers. And I share your frustration, because people will come into me and I will have to say, gee, this is probably going to be \$24,000 and they go dead white.

There are some well-to-do counties where that is not a problem and they say go to it. There are other poorer communities who say, we will have to do it ourselves. And that is okay too. Do look at this particular statute—

Mr. VENTO. The assertion of the claim doesn't cost \$24,000. What costs are \$24,000 is over a period of time if there is a dispute and a nonresolution or granting of the rights-of-way. The assertion of the claim is an administration action which will probably cost too little and will bring us into more claims, but the assertion of the claim—that should be understood.

You can preserve those rights and it may take a while to work through, depending on the importance of that right-of-way and the validity of information they are able to put together.

Ms. BROOKS. That is absolutely correct. My point is that it would not have authority to limit intervention to those that have a specific interest in the road. It may already be included, because Bureau of Land Management repeal rules require that now. But again, the statute appears to say anyone can intervene. If you could limit it to the people who are actually involved—I have seen

some appeals where some very high-priced New York City counsel is suddenly representing some local people and all of a sudden you are inundated with requests for depositions and interrogatories because you have the bright young lawyers that don't have enough to do.

Mr. VENTO. We could represent that the attorneys from the clients could only come from the BLM district, but I probably would have some problems with that. I can appreciate the frustration in terms of limiting who can act as an intervenor or who can apply. But we have left it open on both sides.

I would hope that it wouldn't become a new basis for frustrating appropriate access across public lands. My intention is to resolve the issue and provide recordation, not to drive a new land use policy by virtue of this particular matter, which, of course, some have suggested that really we are trying to extinguish the rights improperly, and that is not the case.

Of course three of you, Mr. Lea, Ms. Carlson, and Ms. Green have suggested that we go beyond the step of what I have done with regards to NCAs in terms of saying we want to get a commonality, we want the professionals to develop this. We understand that.

Our concern is that we have seven of these now and there is no common touchstone in terms of where we are going. There is no format. We have no system that is set up. Ms. Brooks implied that there is a system in place. There is no system, as she well knows, for this. And if we are going to devise it, how do we go about doing it and differentiate this designation? And the concern is we put in more restrictions. And I think there are many that in some instances may be incompatible or need to be subordinated for which that use is established.

All we really have in the bill at this point is a requirement for a study and report. We could ask for a study of these different aspects, but we are not. This is really the easy way out, to try to give it back to the administration, and also would serve notice to my colleagues that until there is resolution to this, my preference would be not to act on more NCAs. I guess I would have to be moved from that position.

Before we go further down this track, we ought to look and see how they are running. They are very different, adopted for different reasons—some to satiate the concerns of those that wanted it to be wilderness—but this is a better management stream from their viewpoint than simply having it in general public lands, so that is the basis for it.

And of course there are all sorts of discussion about ACECs. Our intention is again to more appropriately recognize what they do. But again the ACECs are set up in the 1976 Act. We are simply trying to increase the flexibility of how they are used, increasing flexibility in terms of trying to expand the use of them to additional areas.

I must say that I am not impressed with some of the BLM management of ACECs as they have been. I think there needs to be more precision as to what occurs there; more prescriptive language.

Mr. Thomas.



Mr. THOMAS. Thank you, Mr. Chairman. It is an interesting process. Obviously when you sit here and you think about it and you come from a State where there is a good deal of public land and you think particularly about the ownership patterns, all the conversation seems to be moving against multiple use and that is sort of distressing.

Really there aren't as many options available in my judgment as it sounds as if there are. You are managing something that is set aside from everything else and that is not the case, of course, particularly when you talk about checkerboard lands and those kinds of holdings, and so on.

Sometimes it makes you wonder if you are talking about the same land, but at any rate—

Mr. LEA, I am not sure I understand. I think you are saying that you are a little concerned that these areas, ACECs, will be used primarily for buffers. Would you comment on that?

Mr. LEA. It seems to us that language is, in fact, directing the use of ACECs to protect resources that are a part of a national conservation system. And we are only saying if these resources are outside of a national conservation system, then move the boundary to incorporate them, not establish another protection system around those.

And we don't think that is the appropriate use of the ACEC concept. They ought to move the boundary of this unit that is of concern.

Mr. THOMAS. Is this something that does, in fact, happen and that it would be more inclined to happen, that simply expanding the management of a particular area, the kind of management into lands that are not designated for that sort of management?

Mr. LEA. Well, you hear all the time of instances where there is a national park or there is a refuge or there is a conservation system that has been established and outside there is a resource that might have some impact on the national park and so, how do we protect the national park from this outside influence and it goes on and on.

Mr. THOMAS. Sort of an endless progression.

Mr. LEA. They ought to move the boundary, if that is the case.

Mr. VENTO. Will the gentleman yield?

Mr. THOMAS. Yes.

Mr. VENTO. I would point out, I was looking at our definition in the committee report. The same in the language. We changed and broadened it. There is no question about it. But the word is "may" in some instances include restrictions or prohibitions of any further development, to use the ACEC for that purpose where there is a conservation unit but it doesn't mandate setting up an ACEC for that purchase.

But I understand, notwithstanding that, that we do talk in the legislation about conservation units and having BLM land management plans that are at least trying to cooperate with the establishment of the unit. And if the gentleman would further yield to me on this, the point is we are trying to find ways for Federal land management agencies to work together where they have a use that has been designated by Congress or by the other agency. That is what we are trying to do.



If we have not been artful enough in this, it is a drafting a problem. But I think in the same way that other land management agencies have to be considerate of the BLM.

I thank the gentleman.

Mr. THOMAS. I understand. But, you know, there is a basic issue involved, using for example wilderness. When wilderness is set aside specifically for a certain purpose and the understanding and the commitment is that the remainder is for a different purpose. This is a very important concept; this business of lapping over and protecting everything as wilderness. For instance, Ms. Green last year, you testified I think with identical language that these would not result in buffer zones. You testified to that in the Senate.

What is the basis for that kind of an observation? Could you share?

Ms. GREEN. Sure. We simply don't view the language as creating buffer zones. This to us is just a logical step toward looking at public lands in a more holistic manner, if you will. Ecosystems don't recognize administrative boundaries.

Mr. THOMAS. Ecosystems don't recognize any boundaries.

Ms. GREEN. That is right. So if you have land values that you decide are in the public interest to protect through designation of a national park, wilderness area, whatever else and you have public lands adjacent to that where there is a potential for an incompatible use that would indirectly detract and damage those very resource values that you are trying to protect, then it makes sense to look at that whole picture and do some management that makes sense in that light.

Mr. THOMAS. Mr. Lea would suggest you move the boundary. Ms. Green, if you are arguing that this—

Ms. GREEN. No, you wouldn't want to move the boundary.

Mr. THOMAS. Why don't you overtly move the boundary, rather than sneaking on it from a buffer zone?

Ms. GREEN. Because it might not qualify as a park. It might not be roaded. But you would not necessarily want to have an incompatible use.

Mr. THOMAS. Sure, you and I are not going to agree on this, so we don't need to pursue it any further. But you do agree that it is difficult to imagine livestock grazing would be compatible with NCAs. That is a flat, no grazing, no multiple use.

Ms. GREEN. No, we didn't call for the end to grazing. We said it was difficult to imagine. And what we have said is consistent with the planning that has been adopted in the last four NCA bills and the statement of purpose, which is that the uses of these lands ought to be consistent with the protection of the resources for which they are being designated. If that cannot be shown—

Mr. THOMAS. "Difficult to imagine" doesn't mean "no," then?

Ms. GREEN. If that can be shown as a case for grazing, then grazing would continue.

Mr. THOMAS. Ms. Carlson, you indicate there should be a presumption of limiting livestock grazing. You start with the notion that there should not be grazing.

Ms. CARLSON. We start with the notion that there are values in the lands that are designated as conservation areas that should be looked at in a very hard light against the other resource uses that

occur on almost all the public lands, and that is the possibility for exchange or sale, possibility for mining, mineral leasing, and possibility for grazing.

If I could comment, Mr. Thomas, you indicate that this in some way restricts multiple uses and maybe it is just a difference in our interpretation of that. I see this identification of a national conservation area as somewhere along the gradient. An administrative designation of an area of critical and environmental concern might be dealing with trying to put emphasis on a specific resource or problem. It could be a pollution problem that would cause an area to be made an area of critical environmental concern.

This is a little more stringent management requirements focusing on one or several resource values and then you have the conservation units, the wilderness areas, that are clearly designated for a specific type of reconstruction or specific value. So this is somewhere along that gradient. But it is all multiple use.

Mr. THOMAS. It is sort of hard to get a feel for it and a lot of this is somewhere out there.

Mr. VENTO. In the bill, we don't reverse the burden of proof with regards to grazing either with regards to the ACECs and for the NCAs. That is why, in fact, Ms. Carlson and Ms. Green are finding fault with our language on NCAs.

But I think you are right in the sense that on NCAs, we probably have ducked this issue with regard to El Malpais and other areas. We simply haven't addressed it. We have left that within the flexibility of BLM. In some we have, and others we have not.

Mr. THOMAS. I have no other questions, thank you.

Mr. VENTO. I just wanted to point out that in some bills we have addressed grazing, where it was important, as in the Birds of Prey area, but even there we had to be careful not to require the proof that proved the negative. So really it was up to the land management agency to demonstrate it. That was one of the compromises we made to get the bill passed.

But it is an open question. It is a question of whether we want to address that or fight for these. The idea here is to study. Maybe in the study context we could agree that BLM ought to make a recommendation to us with regards to how they want to deal with NCAs.

The problem I have with the whole suggestion about the issue of buffer zones—and we say they are not doing buffer zones—is that if you change the boundary, you advance the issue. The issue that has to be addressed is how you are going to get the BLM to work in concert with the other agencies where you have interfaces between conservation units and other lands. It might be the BLM's own lands; it might be wilderness as you suggested. And each of these might require a different action. But they at least ought to be part. I think they are part of the plan today, but we are trying to spell it out so that it does become a consideration for concern in the plan.

I have no further questions of the witnesses. I appreciate the work and effort that you all, Ms. Brooks, Ms. Green, Ms. Carlson, Mr. Lea, have put into your statements. I think they are constructive and helpful to me and to the committee. Thank you very much.

**STATEMENTS OF JIM MAGAGNA, PAST-PRESIDENT, PUBLIC LANDS COUNCIL; DAVE HOOK, DIRECTOR/LEGISLATIVE LIAISON, UNITED FOUR-WHEEL DRIVE ASSOCIATIONS OF UNITED STATES AND CANADA; AND GEORGE EARLY, BLM LANDS FOUNDATION**

Mr. VENTO. I don't know that the director is on his way or still in the Senate, but we are pleased to welcome the last panel. Jim Magagna, with Public Lands Council; Dave Hook, United Four-Wheel Drive Association; and George Early with the BLM Lands Foundation.

Mr. THOMAS. Mr. Chairman, before you came, I welcomed Mr. Magagna. He is a constituent from Wyoming and I represent Mr. Magagna.

**STATEMENT OF JIM MAGAGNA**

Mr. MAGAGNA. Thank you. It is a pleasure, Mr. Chairman and Congressman Thomas, to be here and represent 31,000 American families whose lives are dependent on and dedicated to making the public/private partnership of Federal lands work for livestock production.

Allow me to begin by talking about the concept that I see embodied throughout much of the language of H.R. 1603. And I, quite frankly, have to view it as a further attack and a rather direct one in many ways on the continued application of the concept of multiple use sustained yield to the management of Interior Department and BLM lands.

It is not that I am fearful of a discussion of multiple use. It has been the guiding principle for quite a number of years and perhaps open public discussion is timely at this point in time. I would welcome it because I have every confidence that, if knowledgeable parties get together to talk about the best way to manage the vast majority of this broad array of public lands with all of its resources that are under BLM jurisdiction, we will once again conclude that multiple use best meets the needs of the resource and the needs of the public who are dependent upon those resources.

But I think that is a debate that should be conducted in a public forum and the guiding principle for management of these lands should not be changed piecemeal by the addition of some of these specific-use and singular-use concepts that are furthered in H.R. 1603.

With all deference, Mr. Chairman, I have to look at this and see written throughout it the threads of input from people who do not live or understand the west and are trying to dictate to those of us who do live out there how we should live our lives.

True, grazing is not even mentioned in this particular piece of legislation, but I think the impacts upon grazing are apparent throughout the legislation when we talk about each of the various restrictions on the use of different portions of BLM administered lands that could be put into place as a result of passage of H.R. 1603.

Let me get on to some of those specifics, if I might. Some have been addressed earlier but I think merit some repetition. One is the concept of buffer zones. When you see language like "likely to be affected by the use of," this simply is reference to lands that in



and of themselves may not have the criteria necessary to be declared areas of critical environmental concern, but that may be so declared under the language of this bill if they are likely to have an impact on other areas that are of singular-use designation.

Again, let me repeat one more issue that I believe has been addressed by Ms. Brooks, and that is the reference to the fish and wildlife population, but I would like to take this a step further than she did. It does raise a red flag about the relationship between the state fish and game agencies and their role in fish and wildlife management, but it raises another vastly more important issue.

I might go back and refer to the concept of ecosystem management. Every time that comes up, we hear considerable discussion about the fact that administrative boundaries between various government agencies cannot be applied, but ecosystems go beyond single administrative units.

I think when we talk about the administration, the key unit is the relationship between public lands and private lands.

That is the real administrative issue. If we are going to talk about ecosystem management or wildlife populations, we have to be aware of the fact that neither of these types of management can take place, quote, on the public lands. They simply expand beyond the public lands to the intermingled private lands.

Frankly, one of the frustrations that I have trying to deal with Federal land management issues is the seeming inability of so many people to comprehend that you can talk about the resource and habitat in terms of Federal lands, but you cannot talk about the uses of the resource, particularly the wildlife uses, many of the recreational type uses, the aesthetic use of those lands, the grazing use of those lands, in terms of Federal lands. You have to talk about them with an understanding of the intermingled land patterns that prevail throughout the west.

Of particular concern, in addition to the expanded definition of ACEC, is the regulatory requirements that an opportunity be provided for members of the public to propose specific areas for consideration for designation.

When you combine this with the expanded definition, I believe you have literally set the stage for nearly all areas to be at least nominated for ACEC designation, because when you look at the long list of characteristics that can qualify an area "special" and you allow each of us as individuals to look at those from the perspective of what is special to us, you virtually have incorporated the opportunity for all BLM-administered lands to be proposed for such a designation.

Let me again reemphasize the problem with the concept of natural productive capacity, or biodiversity. Again, there is not a single natural productive capacity that can be spelled out and defined for an individual piece of public land. We have to bring into this concept some notion of what we, the public, the people that are concerned with that land, desire to see that land produce because a given piece of land has the potential for a great diversity of productive capacities.

We have to define what that capacity is with some relationship to what we hope to achieve through the utilization of that land,



and under current management concepts, through some relationship to the concept of multiple use.

Simply in a summarization of what we have in here, we already have wilderness area, we have ACECs expanded in this legislation, we have national conservation areas, we have CSUs.

You add all of this together and it really provides the opportunity, if not the likelihood, of single-designated use for the vast majority of the public lands administered by the BLM. Up until this date, we have operated on the concept that they were out there under the multiple-use concept unless designated for a specific use.

It seems to me that we are moving toward the point where they will be designated for a specific use and very little will be left for multiple use. And without being too direct, if I may use the language that was used by an earlier panel member today, under that approach, it is difficult to imagine any significant livestock grazing remaining on the Federal land.

Mr. Chairman, I plead to you in closing that if there is going to be such a serious redirection of the mission of the Bureau of Land Management and the management of these lands, that it not be done in the name of reauthorization, that it be done through open, public debate, through open debate in these halls of Congress as to what the proper administration of these lands should be.

The western livestock industry is, to a degree, unheard of today, a partnership throughout the west with many other users of the public land including members of the environmental community in coalition involving local government as well, that are committed to enhance the ability of these lands to meet the multiple-use mandate.

Rather than redirect the BLM to become an obstacle to that, I would invite you and the members of this committee to join in this partnership by maintaining BLM's flexibility in this reauthorization bill to support these local efforts to bring true multiple-use stewardship and enhancement to these Federal lands.

Thank you.

[Prepared statement of Mr. Magagna follows:]

TESTIMONY

on behalf of

**THE PUBLIC LANDS COUNCIL**

in regard to

**Bureau of Land Management Reauthorization  
H.R. 1603**

submitted to

**The Subcommittee on National Parks, Forests and Public Lands**

of the

**House Natural Resources Committee**

by

**Jim Magagna  
Public Lands Council**

May 25, 1993

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The Public Lands Council represents the 31,000 western ranchers who graze cattle and sheep on federal lands in the 14 western states, and coordinates the public land policies of the National Cattlemen's Association, American Sheep Industry Association and the Association of National Grasslands.

Mr. Chairman, I consider it to be an honor to have the opportunity to participate today in a discussion that is of great importance to not only the western livestock industry, but the economies and lives of those in the rural West.

I am Jim Magagna, a Wyoming rancher, and Immediate Past-President of the American Sheep Industry Association and Past-President of the Public Lands Council. I am testifying today on behalf of the Public Lands Council. The Public Lands Council represents 36 affiliate organizations in the 14 western states and the American Sheep Industry Association, Association of National Grasslands and the National Cattlemen's Association.

The Public Lands Council represents the 31,000 American families who have their lives invested in and dependent on the public/private partnership of federal lands livestock production. This public/private partnership provides the foundation to manage successfully the complex assets of mixed ownership as a single unit to achieve common goals that include responsible, managed production from renewable resources, while maintaining and improving the provisions of Mother Nature.

Many components of H.R. 1603 would severely curtail one's ability to manage the resource consistent with the multiple use and sustained yield mandates of the Federal Land Policy and Management Act (FLPMA). HR 1603 aids a movement that aims to do away with commodity production in the West. Those who advocate many of the destructive elements of H.R. 1603 are perfect examples of people who do not live in or understand the West and are trying to dictate to those who do how we should live our lives. Although these individuals may be well-intentioned, they clearly do not comprehend - or choose not to comprehend - the economy of the rural West and that federal lands cannot be viewed and dealt with in a vacuum. Mr. Chairman, the federal lands in the West are concretely tied with the local economies and livelihoods of those who live and work in our western communities.

Under H.R. 1603, the multiple use mandate of FLPMA would be abandoned. Rather than emphasizing broad multiple use and sustained yield principles, this bill would give unjustified preference to a small handful of selected resources on the federal lands. If this is permitted, the fragile spending practices on recreational pursuits would replace the extensive array of multiple

use activities that create new, taxable wealth every year and add stability and diversity to the local rural economies of the West.

Debate on the management of the public resources in the West includes positions that represent opposite ends of the field of thought. At one end, the public resources are viewed as expansive, untapped sources of profit to be exploited with no regulation other than forces of the free market. At the opposite end is the belief that the resources in the West are too limited and grandiose to support any human entity and should be impervious to human harvesting and set aside for eternity by the most stringent laws and regulations that can be instituted. The challenge for policy makers in the West is to find a balance between these diametrically opposed views, a balance that provides the most good for the most people in the long term.

The principle of multiple use and sustained yield has served us well in meeting this challenge in the past. This principle embodies decisions based upon trade-offs between competing interests. In its purest form, the multiple use principle favors neither end of the spectrum of thought. Rather, it charts a process whereby solid decisions are reached that consider human needs and the land's capability to support those needs. Unfortunately, the term is often misunderstood. A careful reading of the Multiple Use and Sustained Yield Act, with particular attention to the definition, would clarify the true meaning of the Act to those who misunderstand it or misrepresent its charge.

Simply put, a substitute for the principle of multiple use as a guide for managing public lands that has not been reserved for a distinct purpose by Congress or the Administration has not been found. Multiple use and sustained yield is, until the collective will of the public decides otherwise, the law of the land. Charting a new course which runs contrary to the purpose of the existing law, as HR 1603 attempts to do in many ways, is not the answer to the problems we have in managing the federal lands. While I do not always side with the decisions of the Bureau of Land Management, it has proven to be an agency that is very capable in applying this principle to its management responsibilities. The economic viability of the western states and the continued protection of our environment depend upon the ability of the BLM to discharge its duties with the management flexibility afforded by this principle. The multiple users of the



federal lands and the general public have what is needed to sustain the health of the environment and viable, rural western economies; let's follow through with this rather than abandon the multiple use mandate with constrictive, single use mandates.

### Specific Concerns

The members of this Committee need to give careful thought to what they do. Very little of HR 1603 can be said to improve or protect the environment. Much of the on-the-ground actions are already occurring and impediments to rangeland and wildlife improvements lie in lack of funding or bureaucratic delays, not in an unwillingness of federal lands users to address environmental concerns. This bill adds very little to the public welfare and takes a lot from the economic bases of the western states. While characterized as a reauthorization bill, HR 1603 amends FLPMA in several major areas.

The expanded definition of Areas of Critical Environmental Concern (ACECs) could easily be used to prohibit ongoing productive uses of the federal lands and definitely limit such uses in the future. In addition, despite the assurances established in the legislative language that this bill would not create "buffer zones" around existing protected federal areas, that is precisely what this bill would do -- create buffer zones. The definition and purpose of ACECs are too broad and vague to provide meaningful management guidance.

The section which designates Conservation System Units (CSUs) would be amended to include any component of the National Park System, National Wildlife Refuge System, National Wild & Scenic Rivers System, National Trails System, National Wilderness Preservation System, or a National Forest Monument. This addition would effectively require that buffer zones be created on all BLM lands adjacent to these CSUs. The tremendous impact on multiple use is illustrated by the fact that these CSUs would encompass more than 264 million acres of wilderness, parks and wildlife refuges, and over 39,000 miles of rivers and trails.

Under Section 4: Major Uses and Inventories, number one of the Definition section, beginning on line 23, is an onerous one. It is amended by striking "fish and wildlife

development and utilization," and inserting "maintenance of plant communities, maintenance of fish and wildlife populations and habitat, and utilization of fish or wildlife populations."

"Maintenance" can easily be interpreted as maintaining the status quo, which would tie the Agency's hands and severely limit its ability to act. In addition, it could easily translate to the adjacent private lands, which would be considered a "taking." A very poor public policy, and a terrible private policy.

In addition, this bill skews BLM's mandate away from multiple use by requiring an expanded focus on plant and fish and wildlife "protection and "enhancement." These terms trouble us, Mr. Chairman. Exactly what are we going to protect and enhance, and who's going to pay for it? This aspect certainly seems to have been addressed more than sufficiently by the Endangered Species Act.

HR 1603's Stipulations for Professional Qualifications would severely restrict the President's ability to appoint the top leadership of the BLM. If the President can't retain the authority to appoint top level managers that have the qualifications and background to implement Administration policies and deal with career Agency employees, bureaucratic gridlock within the Agency will worsen.

Regarding ACEC Regulations, HR 1603 would, by regulation, allow the Secretary to provide an opportunity for members of the public to propose specific areas for consideration for designation of ACECs. This certainly throws the train off the track. This should be done in the appropriate land use process. This sort of regulatory designation of ACECs would circumvent the correct process. The prospect of these protective zones being designated around national parks and wildlife refuges through BLM's land use planning process, without Congressional or administrative review, is very troubling. The bill's sponsors can't achieve this through the appropriate legal mandates, so they attempt to simply alter the definition of an ACEC in HR 1603. Buffer zones would surely be created, the stated objective of these ACECs is too ambiguous for progress of any sort, and the public would be saddled with another impediment to utilizing the management tools current laws provide.

If enacted, Section 319: Recordation of Claimed Rights-of-Way would be extremely damaging. It would create an overly complex, confusing and costly process to determine the validity of RS 2477 rights-of-way that cross federal lands. The requirement to record these claimed rights-of-way by January 1, 1994 would place an unbearable burden on state and local governments throughout the West. Furthermore, the paragraph pertaining to rights-of-way, beginning on line 4 of page 17, appears to be a pre-emptive strike ... a decision being made before going to "court." Most importantly to the federal lands livestock industry, many of these rights-of-way provide the only form off access for producers to access their private and/or state lands. This access is a neccessity to do business with the "checkerboard" pattern of lands in the West.

Section 18: Management of Public Lands Relating to Natural Productive Capacity, which centers on the nebulous theory of biodiversity, is simply bad science. This won't benefit any user or the resource, only diminish both. What is the definition of "natural productive capacity"? This opens a very wide door and can be interpreted differently from one reader to the next. How would this be tied into productive management of the land when we don't even have a clear definition of what is desired productive capacity? This clouded language serves no purpose in any bill; it would only stonewall productive management and use of the resource.

Lastly, Section 19, regarding National Conservation Areas, is once again an attempt to circumvent the Wilderness Act by designating NCUs (Wilderness areas) without going through the correct process. Blatantly ignoring the appropriate land planning doctrines as this section does only expedites the process of degradation on the federal lands. Such undefined, broad definitions greatly increase the potential for all federal lands being classified as NCUs (or, in the same regard, CSUs or ACECs).

Today's West is a far better place than it ever was a hundred years ago due to generations of people making a continuing commitment to improve their homes and livelihoods for their children. A commitment built on a public/private partnership to produce significant food and fiber through the environmentally friendly harvesting of our renewable resources while managing successfully to improve the watershed, the wildlife habitat and wildlife populations. If

the public wishes to continue this success, we must be aware of this bill that began as a simple reauthorization and has metamorphosed into a lengthy proposal for major changes in BLM land management and a stockpile of various special interest agendas that are unjust and untested. Current BLM planning mandates, if correctly adhered to, are sufficiently adequate to meet the need for services of the federal lands for all interests. Debate on the management and uses of the federal lands is justified, but let's be accountable to the mandates which are in place, which are clearly defined and provide the most good for the most people in the long term.

Mr. Chairman, I thank you for the opportunity to present to you today the views of the Public Lands Council.



Mr. VENTO. Mr. Hook.

### STATEMENT OF DAVID L. HOOK

Mr. HOOK. Mr. Chairman, I would like to thank you for the opportunity to testify on this legislation. Our organization has significant concerns about what you are proposing for H.R. 1603.

We also see it as yet another blow in the concept of multiple use. We do not want to see any further singular-use designations of public land. There has already been far too many areas withdrawn from multiple use. This has impacted our recreation significantly. Our standing in this debate stems from our use of public lands for responsible, legal, and lawful recreation and, of course, other uses.

Our concerns on the legislation basically compose a number of items. The validity of a time limit in our opinion is legally questionable. We would prefer that this would not be placed on the assertion process. However, if it must be, we would prefer that it be at least one-fifth as long as R.S. 2477 was in effect or 22 years or terminating in the year 2015.

Second, every assertion supported by government map or any other publication dated or copyrighted by 1976, or date the law was withdrawn, should be deemed valid.

Third, an instrument of title or patent should be issued by the U.S. Government for each R.S. 2477 right-of-way documented or validated by this process.

Appeals of those positions should be left to the courts. We feel very strongly that setting up a two-tier, involved appeals process will just create another quagmire and gridlock of the process like what is growing for the current appeals process of national forest plans and projects.

Fourth, we feel strongly no access should be closed or discontinued without an impartial and full investigation of an inventory of R.S. 2477 potential. There is something that has not been done well in the past.

The BLM, and in some cases the Forest Service, have done very poor jobs of investigating and inventorying R.S. 2477 potential of various areas that have been withdrawn. We ask in the future that full attention be placed on any further areas as far as travel management and so forth, that all the possible R.S. 2477s be inventoried and treated as possible right-of-way assertions prior to closing any additional areas off.

And last, we ask that the languages of Idaho H.R. 388 passed in 1993 and signed into Idaho law should be incorporated in order to provide guidance for agency actions.

Ultimately, Mr. Chairman, we would prefer that the validation process be handled on a state level, as they can more carefully go over and consider local impacts in this process. But at any rate, we do ask that you consider our suggestions in this process.

Thank you, Mr. Chairman.

Mr. VENTO. You are welcome.

[Prepared statement of Mr. Hook follows:]

## *United Four Wheel Drive Associations*



of U.S. and Canada

Office of Legislative Liaison

52 Main St.

Felton, PA 17322

May 23, 1993

### Testimony

National Parks, Forests and Public Lands Subcommittee

House National Resources Committee

On

H.R. 1603 BLM Reauthorization

By

Utah Four Wheel Drive Association

United Four Wheel Drive Associations

Mr. Chairman, and members of the Subcommittee, I would like to thank you for the opportunity of giving testimony on Congressman Vento's bill. I am here to express feelings of concern.

We have studied RS 2477; its history, application, and impact on our activities. The information has been submitted to the BLM and to several Congressional offices. RS 2477 granted rights-of-way over unreserved federal lands which were a type of easement which diminished the rights of the Federal Government while keeping title to the land itself in Federal hands. RS 2477 was only one of several grants made in the last 200 years. Other examples include Homesteads, Land grants for Railroads, Public Buildings and Veterans of Wars, and rights-of-way for ditches, canals, and highways.

Our standing in this debate stems from our use of public lands for responsible, legal and lawful recreation, and other uses. The right to cross or access federal public land was never questioned prior to the passage of RS 2477 which merely granted and acknowledged the right to create, delineate, modify and otherwise construct suitably improved routes, travelways, and other highways across public land. Before the passage of RS 2477, persons had a right to cross public land, but did not have a right to improve or modify the travelway. Later questions concerning the right of passage were answered by the Unlawful Enclosures Act of 1885, which protected the freedom of travel over public lands.

The combined effects of the land and property rights grants and the act of 1885 have led to the present situation - the Federal government owns the title to the land, however it does not own the wildlife, minerals, highways or access rights, water, or grazing or other use rights. These have been granted or sold by the Congress. Laws of property as developed by Congress and the Courts preclude the government or other land owners from selling or transferring rights or property which is not owned by the seller or have been previously transferred. This protects the buyers or grantees. Congress has previously recognized and protected valid existing rights. The Union Pacific Act of 1862 is frequently cited as is the saving provision of FLPMA.

*Charter Member of TREAD LIGHTLY!*

We feel that Mr. Vento's legislation is at variance with these traditions by specifying extremely short registration periods, encouraging extremely prejudicial determinations, and giving no or bad guidance concerning agency timetables for action and determination of validity criteria. We ask specifically for the following changes:

1. The validity of a time limit is legally questionable. However, if included, it should be at least one fifth as long as RS 2477 was in effect - 22 years or 2015.
2. Every assertion supported by government map, or any other publication dated or copyrighted before 1976, or date of land withdrawal should be deemed valid.
3. An instrument of title or patent should be issued by the U.S. Government for each RS 2477 right-of-way documented or validated. Appeals of those positions should be left to the courts.
4. No access should be closed or discontinued without impartial and full investigation and inventory of RS 2477 potential.
5. Languages of Idaho HB 388 1993 as passed and signed into Idaho law should be incorporated in order to provide guidance for agency actions.

In summation, we would prefer the entire validation process be administered by the individual states rather than the Federal Government.

Again thank you for this opportunity.

Respectfully,  
David L. Hook, Dir./Legislative Liaison  
United Four Wheel Drive Associations  
(717) 246-2162, fax:(717) 244-1693

*Charter Member of TREAD LIGHTLY!*

Mr. VENTO. And finally on this panel, we have Mr. George Early with the BLM Lands Foundation.

Mr. Early, your testimony is in the record.

### STATEMENT OF GEORGE EARLY

Mr. EARLY. I represent the BLM Lands Foundation whose purpose is to encourage sound environmental management of BLM lands. I am commenting on the newly added Section 19 of this bill. BLM Lands Foundation is very pleased and encouraged by the addition of Section 19 to this bill and appreciates the opportunity to comment.

The purpose of Section 19 is to identify national conservation areas with public participation within 3 years. There is indeed a desperate need for this identification, retention, and protection of outstanding areas, crown jewels, treasures or whatever you want to call them, on public land. This need has been dramatically shown by the current battles over the East Mojave.

This identification can and should be done only through legislative mandate. As commendable and necessary as this identification is, it will surely accelerate one very serious and disturbing problem. That problem is the continuing movement to take BLM's best lands away from them and give them to other agencies, primarily the Park Service.

Section 19 is going to encourage this damaging trend unless some mechanism is built into this bill to stop these transfers. I am going to suggest a solution, but first, let me give you a little background on transfers.

Four national environmental organizations have, for decades, used BLM lands as a grab-bag supermarket for their pet projects, mainly costly and unnecessary national parks and monuments. The establishment of these parks seems to be an important focal point used by these organizations for fund raising. They seem to be completely uninterested in using their vast influence to insist that BLM properly manage these lands in the first place.

In 1951, BLM had 451 million acres and currently has only 271 million acres. No better or more current illustration exists of such transfers, than those contained in the so-called California Desert Protection Act, Senate Bill 21 and House Bill 518. These bills propose a massive transfer of 3 million acres from the BLM to the Park Service.

The purpose of H.R. 1603 is to improve the management of public lands. It seems to me, transfers proposed in S. 21 and H.R. 518 are diametrically opposed to the stated purpose of H.R. 1603. How in the world can we improve the management of BLM lands if we continue to undermine the agency by taking away their outstanding lands piece by agonizing piece for no good reason.

The transfers proposed in S. 21 and H.R. 518 set an awful precedent, someone should stand up and stop it. If the proposed transfers in S. 21 and H.R. 518 are passed, there will be a clamor for all outstanding areas identified in Section 19 to be transferred to the Park Service. I suggest that a provision be added to this bill setting a 10-year moratorium on the transfer of any national conservation areas so identified by Section 19.



The most important thing we can do for sound public land management in these very special areas is to send a strong message to everyone that the transfer game is now over. We also need to legislate guarantees that these special areas will be managed in the most environmentally sound manner as possible. And I personally believe in multiple use with some modification. Let me add that.

And finally, we must stop starving the BLM. We must give them the money they need to do sound environmental management in the long run. It will be much cheaper than wholesale transfers to the Park Service in the future which are sure to come, unless we address this problem now.

I think Section 19 is something that is very needed and it is a great addition to the bill.

Mr. VENTO. Thank you, Mr. Early.

You know, Mr. Magagna, I agree with your suggestion that we ought to have open hearings and open debate. I thought that is what we were doing here. Obviously, this may not be suitable to everyone, but we had an earlier hearing on grazing which we intend to act on, and are having an open hearing on this measure which we intend to act on.

And, really, it is in the context of reauthorization. I think what we are pointing out here is a number of concerns that continue to develop. I noted, Mr. Early, your frustration. I think, obviously, that if something is suitable for park designation, it ought to be designated a park. But there has been historically, many BLM acres that have transferred, some into parks, some to allotments and other types of claims, some to be railroad lands, some for access claims, and so forth. So it has been very interesting to recognize the changes in terms of loss of land.

And I think what we are trying to do, obviously, is to address the multiple-use role that BLM has in the context of the legislation and try to update it in terms of if we are going to designate NCAs. The Congress does that.

All we are suggesting in this language is a study by the BLM of what the criteria are or should be. Do you object to that?

Mr. MAGAGNA. No, my concern is that we are not addressing the issue as to what the guiding principle of management should be. We are leaving that in multiple use, but we are eroding acreage that the BLM has left to apply the principle—

Mr. VENTO. But the point is, I am asking for a study of NCAs by the BLM. Do you object to that? I don't understand your suggestion on the NCA language in this bill. All I am asking is for the BLM to do a study. Why are you objecting to that?

Mr. MAGAGNA. My suggestion is, when you take the cumulative impact, that what you are doing is eroding what was at one time the majority of BLM lands which were managed for multiple use. You are taking so many of them out for different purposes through the specific mandates that you are doing it that way and we are failing to address the impacts on some of uses.

We are failing to address the economic impacts on local communities on the public lands states, which I believe there arises an issue of equality, of the right of those states to support state and local economies based on responsible, productive use of these Fed-

eral lands, which constitute more than half the land base of several of these western states.

Mr. VENTO. Well, you obviously are not answering the question I asked. But the point is that the totality of the bill, doesn't designate wilderness areas. The conservation units are a definition in the bill, referring to existing areas.

Mr. MAGAGNA. What the bill is asking for is a further identification by the agency of areas for special identification. Whether it is in the conservation units where you are asking to enhance the process of—

Mr. VENTO. Well, in that regard, the bill says "no portion of the public lands shall be designated a national conservation area except by an additional Act of Congress." It would still require action of Congress. What we have now, as I have said before, is that Members are introducing bills for NCAs right now to Congress.

There are two or three such bills that have been introduced per session and what we are trying to do is get the BLM to focus on what the common characteristics of NCAs should be in order to have some guidance so that we know what would be appropriate and how they would be managed.

So you may have an argument with an NCA, you may want to come in and testify against that, but this bill isn't the one that is doing it. All we are doing is trying to understand the commonality between those that exist and those that might be proposed in the future.

Mr. MAGAGNA. What I see that particular language as doing is setting the stage through that type of identification of commonality for a much more active nomination and designation of conservation units.

Mr. VENTO. You would rather, in other words, operate, as we have been, on this on an ad hoc basis and not have any common characteristics? You prefer that?

Mr. MAGAGNA. I would prefer that.

Mr. VENTO. I was trying to understand, but I do not understand that. And you would prefer that we not refer to the other lands that are conservation units in this bill in terms of BLM trying to address its management scheme in terms of where it interfaces with those areas; is that correct? Whether they be wilderness, parks, wildlife refuges, you prefer that we act as if we are blind to that?

Mr. MAGAGNA. I don't think we act as if we are blind to it, because I think what we are doing is encouraging the expansion of those areas, perhaps not the expansion of national parks or wilderness areas—

Mr. VENTO. What are we expanding?

Mr. MAGAGNA. The overall designation of BLM lands for more restrictive use.

Mr. VENTO. Well, we are talking about compatible land plans where it is not as if something has been designated as wilderness. You don't want to encourage the administrative problems by virtue of what you do on the other side.

Mr. MAGAGNA. Let me suggest that along with that on one side of the spectrum, there also then arises the need to identify a large blocks of intermingled private lands that have been identified for

particular types of production and do some coordination to make sure that other lands aren't being managed in a way that is harmful to that.

Mr. VENTO. Well, I think that that is possible. If I had included any language like that in this bill, there would have been an uproar in the west that would not have stopped. Language that BLM, in terms of doing its land management plans, ought to consider what is going on in terms of the private land intermixed.

I don't know what the right language would be for that, but I tell you, based on the sort of interpretations I'm getting on what I did here, if I had put that provision in, we probably would have had a revolution. I found that statement, quite frankly, incredible, in terms of what you wanted me to do, what we should do in this particular bill.

Mr. MAGAGNA. I am simply suggesting, Mr. Chairman, that if we are going to view parcels of land in terms of their impact on adjacent parcels because they happen to be a wilderness or a conservation unit, then it would seem entirely appropriate that we view other parcels of Federal land in terms of the impact of their management on the current uses being made of private lands.

Where that Federal land is critical to the viability of the activity—

Mr. VENTO. Unfortunately, we can't go by current uses. It might be passive today, but the plan has to be commensurate with private property rights. The plans are already in there. So the very language that you suggest would perhaps sharply limit individual property rights. I understand the concern you have, but I think the general plans that already exist in terms of resource management plans supposedly already address that. I didn't know that there was a problem or as big a problem.

Mr. MAGAGNA. Supposedly. In reality, they often do not address that.

Mr. VENTO. Well, by changing the language, I think it is sort of a two-edged sword here, that you are suggesting we ought to try to improve that language, I guess.

Now, let's see, I have a question for Mr. Hook. Would you agree, Mr. Hook, that it is difficult to inventory R.S. 2477 potential when the Federal agencies do not know where assertions may be made?

Mr. HOOK. Well, Mr. Chairman, I think we have in our records at least as far as the maps that have been available from the past, from all of the routes, all of the roads and so forth that could be documented under this process that meet the criteria.

Mr. VENTO. Well, would you be satisfied if we just went to the existing map resources we had and had a review of those, and if it isn't on a map, if a road isn't on a map, then you suggest that that ought to be guidance for BLM in terms of making the determinations as to R.S. 2477, period?

Mr. HOOK. No, sir, not totally. When you have a number of situations that come up in a situation like that, if you are going to make an assertion, you have to prove that that road existed and was on unreserved public land prior to 1976 or before the land was reserved.

Now, to do this, you have to show it was on a map, or document prior usage or prior construction or something like that.



Mr. VENTO. What is wrong? I guess I misunderstood your question. But isn't that exactly what is required? Shouldn't the national government, the public land managers, have an assertion, an affirmative action be made to make that particular claim?

Mr. HOOK. Yes, sir, I believe it should be. But in the past, a lot of these situations were ignored, when in fact the management agencies knew that a certain amount of eligible R.S. 2477 highways existed.

Mr. VENTO. Well, has the burden ever been on the BLM to make the assertion for the individual or entities that wanted to have the rights-of-way? When was that burden on the BLM? Throughout its history, has it ever been on the BLM to make that assertion?

Mr. HOOK. It should have been, Mr. Chairman, because—

Mr. VENTO. Well, and you are going back to 1866 now, it never has been. So now you are suggesting that the assertion should be that the BLM should prove the negative.

Mr. HOOK. Well, one of the problems we have in this process is an area is designated wilderness, and then a lot of people have been in an uproar about R.S. 2477 that somebody might claim an assertion within a wilderness study area or within a wilderness area. Isn't it logical that when these areas were designated and studied and a scoping process went forward, that all of the possible R.S. 2477s were identified before the area was designated, so this problem would not arise in the first place. That is my point, Mr. Chairman.

Mr. VENTO. So are you saying that there should be no right—I think you are not saying this—that the BLM should have been responsible for knowing that there were assertions. On various occasions where they know that that problem exists, are you suggesting that they avoid it, the known routes in terms of BLM wilderness?

Mr. HOOK. Yes, sir, that happened in many occurrences, many situations. Not only BLM, but Forest Service.

Mr. VENTO. The only remedy to that is when it is being studied, if the individuals had a right, they could have asserted that particular right, couldn't they? I mean, during the study process at the very least, before designations, they could have attempted to assert the right and it goes through an adjudication process which ultimately ends up in court if you are dissatisfied with the BLM administration; is that it?

Mr. HOOK. Yes, sir, that is correct.

Mr. VENTO. So those are problems past. I can't go back. But I think what we are trying to do is bring this to a conclusion so we have a codification, a recordation of what exists. And you suggest that we go through 22 more years, in other words, something like the year 2015, to determine whether there are any rights established prior to 1976 that would fully be about 40 years after the law had foreclosed and extinguished the right to obtain a new right-of-way.

Mr. HOOK. Mr. Chairman, I don't know what the proper period would be, but certainly until the beginning of the year is not nearly enough time for people to bring these assertions up to date.

Mr. VENTO. Well, frankly, I don't know that it is not right. I am not convinced it is not correct. If people have a right-of-way and they want to assert it, they should be aware of it. So I guess it is



a question of whether we live in an age of modern communication or we still live in horse-and-buggy age in terms of communication.

Yes, this has been something that has been reported actively and has been an active issue in the States that are affected by it, so that most people are aware of it, especially since we are talking largely about public entities. Now, of course to make a claim is not to establish the right. But that certainly would protect anyone during that period of time.

So I don't know what the time is, but I wonder since we worked on this since 1991 why 6 months isn't enough time or 8 months isn't enough time.

Mr. HOOK. Clearly a lot of people feel that it is not nearly enough time. I mean this whole process has come to a head in recent years. A lot of people have gone through a learning curve on R.S. 2477 and I disagree that everybody knows about it. I know a whole lot of people who do not or are not well-versed in it at this point.

Now, I think before you can deny people due process by a hasty cutoff date, I feel this needs to be fully processed through land management agencies and people should be given an adequate time to bring their assertion possibilities up to date. And clearly 6 months is not long enough.

Mr. VENTO. Well, I agree with adequate time, but I don't think 2015 is or 2017 or whatever it is in your suggestion, is in any sense reasonable.

Mr. HOOK. We only threw that out as an arbitrary point, Mr. Chairman. I don't know what the proper time is.

Mr. VENTO. Any point is going to be arbitrary. So in any case, Mr. Hook, I think that the issue is that we are really trying to deal with legitimate rights here and bring this to a closure in terms of recordation.

Mr. EARLY, you suggested a ten-year moratorium on transfers of land from BLM to other agencies. I assume you are referring to a moratorium on administrative transfers since we can't bind future Congresses.

Mr. EARLY. I suppose I am. I realize you can't do that. It is just frustrating to me to see the lands parceled off and not give the agency time to do proper management. I have been in many resource offices, many district offices, and I can tell you the morale of a lot of staff people in the BLM is pretty low because of particularly this California bill.

And they are just almost paranoid about identifying their outstanding areas because they feel they are going to lose them to the Park Service. I feel this is an important issue. I don't really know quite how to deal with it. I guess you really can't put a moratorium on transfers, but if there is something you could do to try to discourage this tendency to transfer their outstanding lands away from them, I think it would improve their morale and their management of all public lands.

Mr. VENTO. Well, I think the congressional decisions are based on their perception of the way that BLM manages lands that are under their responsibility. And so that sort of leads us to the conclusion of this panel and to hear from the new director. I thank you all for your testimony.

We are trying to notify members. We will take a ten-minute recess so Members have a chance to come to the meeting so they can hear the Director.

[Recess.]

Mr. VENTO. The subcommittee will resume its sitting.

We are pleased to welcome James Baca, new director of the BLM. I was pleased previously, yesterday really, to get acquainted briefly with him. I have also looked over his testimony and am aware of his interests and dedication and his good faith in terms of dealing with me as the subcommittee chairman and with all the members of the committee.

Jim, I appreciate the fact that you had a conflicting responsibility. Frankly, we have held up the hearing on this reauthorization bill waiting on the Senate to act on your confirmation. I might say that I had hoped that that would have occurred sooner, but in any case, we fortunately have time to work out and to work together on many of the issues that are before us.

In the past, my experience has been that the BLM has had a rather tepid, if any, legislative program before the Congress. And in speaking to the Secretary about the Department of the Interior, I think that was pretty well reflected in terms of the overall legislative program.

It is my hope and expectation, and I hope it is a goal that you share, that you will attempt to develop a sound authorization legislative program, as well as asking for the money to do things, which of course is fundamental to carrying out the various substantial responsibilities that you as the director share with the Secretary, and which you specifically are charged with—I hope that's a substantial amount of the workload, Mr. Baca.

We have been concerned that many BLM issues, not just with regards to the Pacific Northwest, but with regards to many other matters, have been left at rest or in controversy, even some of what I think are or should be rather routine in terms of common-sense land management. The result is a great deal of controversy about things addressed in this reauthorization bill.

And so I hope that we can begin to establish the type of communication between ourselves and between the constituents that we represent and constituencies that are affected by public land management. I think BLM, with the Organic Act, was given a rather good framework, which in my eyes and the eyes of many, has not met its full potential.

And I think that while there have been a lot of positive efforts, that the cumulative effect is that BLM has fallen short of the expectations that were raised in passing the legislation. Some of the response in the reauthorization bill that I have submitted attempts to improve matters at least on some points, but not on all points. In any case, we would very much look forward to your work and want to work with you as you gain an understanding and gain a better grip on the operation and work of this land management agency, administratively from the professionals and on the ground with its constituencies.

We know of your excellent record, incidentally, in New Mexico, working in a land management role, so we know that you come with a sensitivity and background which is reflective of the vast

majority of the constituency that is impacted by this legislation and by the laws and administration of the BLM.

So without further being said, Mr. Baca, welcome, and you have my commitment for a good faith effort to work with you. Welcome. Your statement has been made part of the record.

**STATEMENT OF JIM BACA, DIRECTOR, BUREAU OF LAND  
MANAGEMENT, DEPARTMENT OF THE INTERIOR**

Mr. BACA. Mr. Chairman, thank you very much.

Usually I wouldn't read a statement, but it is pretty short. It is pretty concise. So if you don't mind, I will go ahead and read it.

I appreciate the opportunity to appear here today to discuss H.R. 1603 which relates to the appropriations for the Bureau of Land Management and to its management of the public lands.

We recognize, Mr. Chairman, that you and this subcommittee have spent considerable hours addressing BLM reauthorization legislation. We appreciate your commitment to providing a good road map for the future for the Bureau of Land Management. That is a commitment that we will share.

The administration supports a comprehensive reauthorization bill for the BLM and would like to work with you in addressing the provisions of H.R. 1603 that go beyond reauthorization. At this time, we request your consideration of a short-term reauthorization while we work with you and your staff to address a broad range of issues facing this agency. We will then submit our recommendations to you in a report.

At the United Nations Conference on the Environment and Development last June in Rio, the United States and 176 other nations agreed to operate by the principle of sustainable development, to promote sound economies and protect the environment. BLM has actually had that mandate, called multiple use and sustained yield, since the Congress passed the Federal Land Policy Management Act in 1976.

But a great deal of work lies ahead before we meet that goal. The provisions of H.R. 1603 are designed to achieve better quality and more effective management of BLM administered lands. Those provisions are crafted to address issues such as how the BLM should use special designations to protect fragile and extraordinary resources; whether the Bureau's resource management plan should be updated on a specific schedule to be made more responsive to current needs; how soon we can work out equitable solutions to the problems such as R.S. 2477 right-of-way assertions; and what should be the relationship between the BLM-administered lands and other lands.

We think that these issues need to be addressed and we are eager to work with the committee to work out the best approaches and solutions. Other agencies, such as the Department of Agriculture, are also affected by this bill and will join us in addressing these and other issues raised in this bill.

For this reason, the new administration is reevaluating how the varied and valuable public lands should be managed in the balance of the twentieth century and into the twenty-first.

We expect to present to Congress in the not too distant future a proposal that would promote ecosystem-based approaches to



managing the public lands. This is especially important in the arid, semi-arid, and sub-humid landscapes of the American West. Among other issues, we are considering provisions for cost-effective partnerships with other agencies, states and nongovernmental organizations; collaborative research and monitoring projects with the proposed National Biological Survey; assistance to western communities in anticipating and adjusting to changing resource conditions and trends; development and implementation of integrated environmental and economic accounts for an ecoregion, such as the Colorado Plateau, as a collaborative effort with other Federal agencies, states and local governments; and guidance for fair pricing for the use of Federal lands and resources; and creation of a BLM foundation to provide nongovernmental support for BLM programs.

As you can see, this is a full menu and will take some time to develop. We are already working on it, listening and gathering good ideas.

Consistent with the direction given to us by the President and Secretary Babbitt, our goal is to enhance the protection and sustainability of the resources that we manage. In addition, we want to manage those resources so as to provide a fair return to the taxpayer.

We also want full public participation. We want to hear from the people who really own these lands. We know that the Chairman and the subcommittee share these goals and we look forward to working with you to develop a bill that reflects the work you have done as well as many of the suggestions that we may offer.

Mr. Chairman, that is my completed text, and I guess the only thing that I would add to it at this point is that we know that the West is changing and we know that BLM is going to have to change along with it. And we are willing to do anything it takes to get it done.

Mr. VENTO. Well, thank you very much. You obviously have articulated a significant mission and I think reframing of the vision, any one of these, would be very substantive changes. But taken together in terms of their context, I think it does hold hope for rather a full legislative program.

One of the things we are always tempted to get involved with is the discussions between the various committees in Congress, whether appropriation or authorizing. But needless to say, I just want to assure you that I think with the commitment of the Administration to resolving problems like the reauthorization, and there are other outstanding issues like R.S. 2477 or even something heated like grazing, I think that much of our jurisdictional jousting will be arrested.

We really are looking for finally resolving the policy questions. We want to play a role. The members of the Natural Resources Committee, and specifically this subcommittee, are here because they want to play a role in terms of these issues. I would just suggest that we don't expect you to take on our jurisdictional fights with the Appropriations Committee. We have a couple of tools to do that.

But I think that in moving forward on some of these policies, you want to be certain to engage the members of the committee, including myself and my staff, who have spent a lot of work on it as well.



We don't want to exclude members of the Appropriations Committee, but we certainly want to do the job that we are expected to do.

I think in the past it sort of frittered away because there hasn't been as much of a focus on some of these issues as there should have been by the administration. It was really one I think more of words than of deeds. How long do you think it will take you to evaluate, before you are to come back to us with a more comprehensive BLM reauthorization proposal or a program such as I discussed?

Mr. BACA. Senator, I put together a little group to work on it. I would assume we can get back to you probably within 60 to 90 days with our first draft.

Mr. VENTO. Well, I know that you won't be limited simply by the issues that I have raised here but will be looking at other matters as well; is that correct?

Mr. BACA. That is correct.

Mr. VENTO. You are examining some possibilities of reorganization; is that correct?

Mr. BACA. Congressman, yes, we are. And if I call you senator, and if I have, I apologize. I have been over there all morning.

Mr. VENTO. It is all right. I didn't take it too seriously.

Mr. BACA. Yes, I think our whole organizational structure, that has been sort of an administrative thing, I think, has been under way for the last year. I have looked at the documents they have come up with. I think there are a lot of good things in them. As far as the reauthorization bill goes, I am not sure that that administrative function necessarily needs to be in there.

One of the things that I am looking for guidance on the reauthorization bill is perhaps expanding some of the definitions of multiple use to make it clear that the BLM can become more, and must become more, than just a development agency. Because in many respects, that is I think how people view us.

We would like very much to get into the business of recreation, of protecting special areas that may not have park status but are certainly worthy of protection. The BLM foundation is something that most of the rank and file thinks is very important to put us on a par with other public land agencies, most of whom have these foundations. We are going to need guidance and suggestions on fair market pricing, although we think we can do much administratively. And I think the list of menu items may be also too big for all we could for BLM, but I don't think there is a better time to do it.

Mr. VENTO. Well, I tend to agree that we ought to move ahead, but have to make some judgments about the impact of those things both politically and practically. One of the ways I think it would be helpful is to exercise existing administrative responsibilities. And that is with regard to both the grazing issue and the fees charged for it, as well as other controversial issues like R.S. 2477.

When do you expect the final report on R.S. 2477 that was required by the appropriations conference report late last year?

Mr. BACA. Congressman, I assume that that report will be coming out in about a week, about June 1.

Mr. VENTO. So that will be guidance. Have you examined that and studied that issue enough so that you can suggest legislation, or are you reviewing the possibility of administrative actions with regards to R.S. 2477 applications and rights-of-way?

Mr. BACA. I have not reviewed the document. I just was out of town all last week and actually a draft, I think, is sitting on my desk at the office. I just did not have time to get through it in a timely way.

Mr. VENTO. Well, let me just suggest to you that I think that if there are administrative actions that you could take, I would hope that you would review it, review the authority that you have, to begin to fill in the blanks.

The problems that I run into with legislation here, as those that are present can recall, is sort of the reaction of some wondering what the intentions are, as opposed to the practical impact. Certainly it is my anticipation that even with the recordation language in the legislation, really much of this would be worked out or would be accomplished administratively in the field.

Obviously, you don't want to extinguish someone's claim without proper due process in terms of filing time and/or a proper consideration of the merits and facts to be presented and an appeal process. Apparently, some have said we have too much due process, and here at the same time of course they are insisting that there isn't enough, that we have to go until 2015 in order for all of these to be recognized.

So we have some special problems there and I think that anything that is done would hopefully be helpful to allay those concerns. The point is, you can't be a manager if you don't know what claims lie against you for rights-of-way. And for that matter, for many other issues that are in public lands, it is hard to manage them when you have got such outstanding problems that are being invented almost daily.

Another question that I raised is that of dealing with grazing. This is dealt with in a separate bill this year, but I hope you agree that Congress is going to legislate about grazing. We should do so in the authorizing committee, and I hope that we can work out the differences on that matter in an amiable way.

The bill I've introduced includes some new ideas. It doesn't include the two-tiered system that the President has spoken to or at least that Secretary Babbitt reports to me that the President is committed to.

Mr. BACA. Congressman, I think Secretary Babbitt's timetable on the grazing fees is probably August or September, to come up with his plan. There is a lot of work being done on it, even as we speak. People are meeting about it, and I feel that he has stated quite clearly that he wants to do this administratively.

Mr. VENTO. Can you relate at this time of any interest in the national conservation area designations that Congress has done for BLM in the legislation that we have before you? The bill would call for the BLM to come up with some specific commonalities between the existing national conservation areas and what the criteria might be for future reference if indeed Congress decides to designate such areas.

Do you have any views with regards to the NCAs that you can share with me today, with the committee?

Mr. BACA. Mr. Chairman, I don't have a list of criteria. I just know that there is probably going to have to be one. That is one of the things I think we would like to come back and talk to you about.

I think if we don't have a list of criteria for what an NCA is, then it is going to get to be a very sloppy process and it is going to involve a lot of staff time at BLM trying to manage areas that maybe were put into the designation that shouldn't have been, or maybe there are some areas out there that should be that weren't put in.

So our staff is working very hard on coming up with some sort of criteria for this and I will present it to you. I don't know if Mr. Penfold has anything.

Mr. PENFOLD. I don't have anything.

Mr. VENTO. He can join you if you wish. One of the issues that has blossomed into a significant discussion has been the Secretary's commitment to a biological survey. Could you respond to a question concerning it?

What do you see as the impact of the biological survey proposal on the Department or on the Bureau of Land Management in terms of your scientists and/or the utilization of information from such a database or expertise?

Mr. BACA. Mr. Chairman, the National Biological Survey, as it stands right now, is not affecting the BLM in a large way monetarily. I think it is around 6, \$7 million with nine or ten FTEs. I think we fully support the idea of a National Biological Survey, just as we support ecosystems.

We can't do anything in a vacuum in BLM without knowing what the other agencies are doing and I think Secretary Babbitt's plan is that when you have a National Biological Survey, everybody is reading off the same menu on how we are going to manage things. And so I don't think it is a hindrance. Even if it were a bigger budget implication for BLM, I don't think it would be a hindrance for us. I think it is something that has to be done.

Mr. VENTO. You know, Director Baca, maybe it is just recently, maybe it is just because of the talent that was involved in writing the Organic Act, but the BLM has on paper, I think, one of the best land management schemes and concepts, in fact, of any of the land management agencies, including the Park Service.

I just think that on paper, when you look at it, it works very well. In fact I think it is evident, too, in some of the wilderness management objectives and plans that have been put in place.

I think in some of the documents that BLM has they put forth in terms of resources, whether it is fisheries, wildlife, other types of habitats, but the thing that concerns me about it is that often there aren't the personnel on the ground.

When you look at an area like the California desert, you realize the small number of BLM personnel that are present there, it really means that the gap between what is written in law and administrative procedures becomes even greater in terms of not being able to execute or carry out that particular mission. At least that is the impression I get after having observed it in detail for many years.



And I think it has been improving even during the past administrations, which may not have shared the same views that I do about management in these areas, but I think that there really has to be some way to build upon their groundwork. I am especially pleased to note your discussion of collaborative efforts and how we can work together.

I don't think you can hope to grow the BLM into double its size within the 4-year tenure you probably will have, but clearly your ideas about working with other state governments and other agencies to try and beef that up are good, and I think for instance something like the biological survey which the Secretary has called for would have a big impact on public lands, and so it becomes even more important to BLM than it might be to an agency like the Park Service.

Mr. BACA. Congressman, I agree completely. We were over in Senate Appropriations this morning and we discussed this a lot. Even if BLM were to become the most efficient agency in government and were to get as many people on the ground and out of the administrative post as possible, we still couldn't hold a candle funding-wise, on a per-acre basis to what the Forest Service, National Park Service, everybody else gets. We are down at about \$4 an acre. Most of them are up around \$15 to \$20 an acre in the amount of money they expend on management of their lands.

If we do change in the BLM in the future though, and if we do get more into the NCAs, and if we do get into more recreation and visitor center types of things, we will have to have some increases to meet those demands that are going to be placed upon us.

And so if BLM is going to change, there has to be some recognition that it is not going to change without some commensurate appropriation levels to help it change. But I don't think we need to get up to the levels of the Forest Service and the other groups. And in fact, I think the Secretary wouldn't want us to. I think what he wants to see all these agencies in Interior do, is work together and share the resources: Its own ecosystem, so to speak.

Mr. VENTO. Well, beyond that, I think the question is not only how BLM interfaces in the Department of the Interior, but also interfaces with the Forest Service and Department of Agriculture with regard to so many issues. That is another important point. But I agree, within the context of how each of the agencies work in Interior, that is one of the great pieces of wisdom in terms of putting them under one roof and attempting to share the various information. It is terribly important.

Well, I have to go vote. I have seen no other of my colleagues arrive. I am sorry, because we had hoped that this would be an opportunity for Members to get acquainted with you. It has been a good one for me. I don't know what your schedule is at this point, Mr. Baca.

Mr. BACA. I am pretty free until about 4 o'clock.

Mr. VENTO. Well, we can recess and then come back and, hopefully, I can bring some members with me from the Floor. So if you can stay around for about 15, 20 minutes, maybe someone will come back and ask a question. Some of them may have been distracted by the vote on the Floor. So we will recess and then I will return.



[Recess.]

Mr. VENTO. The subcommittee will resume its setting with the BLM director, Jim Baca. Pleased to welcome another Jim, Jim Hansen, the Ranking Member from Utah, and I'll be happy to yield to the gentleman.

Mr. HANSEN. Well, thank you, Mr. Chairman. I apologize for not being here sooner. May I ask the Chair, have we had his testimony?

Mr. VENTO. Yes, I thought it was clear, he had presented his statement and went through a number of issues asking for a period of time to analyze the legislation further and make recommendations more broadly, and then pointed out a number of issues that are his objectives. And on page 3 of the testimony, which I would be happy to share with the gentleman here, he makes some points concerning the cost-effective partnership, collaborative research, monitoring, and assistance to western communities which I am certain would be of interest to the gentleman from Utah, and so the gentleman can see generally his outline, and supporting generally the programs of the Department of the Interior as articulated by the Secretary in previous instances.

Mr. HANSEN. Well, thank you Mr. Chairman.

Mr. Baca, congratulations on your appointment and we look forward to working with you. Those of us from the West have some very in-depth concerns about things, as you can well imagine, and I am sure you know from your own state. We have very strong feelings about the multi-use concept, we have very strong feelings on certain reasonable ways of timber, mining, grazing, all of those things.

I and many of us definitely feel, contrary to popular belief, that many things can be done in an environmentally sound and judicious way. I guess the balance is where we are always concerned in the state. Prior to coming here, I was in the state legislature, speaker of the house, worked very closely with then Governor Matheson, he was an extremely fine individual on a project we called Project Bold.

You may recall, Mo Udall spent some time on that, and very candidly, it was too bold at the time because we had to envision what would happen to ten other western states. I still recall Mr. Udall, Chairman Udall, putting his arm around you one time and saying: What do you do in the State of Utah that will affect all of us?

But you definitely feel as you have in New Mexico or especially on school trust lands, you turned that into a win/win for your students. We are trying to do the same thing in some of the other western states. I think most of us want to do what we think is right for our constituency and for America.

And I am not going to ask any specific questions because I am not in a position to, not hearing your testimony. But I will look forward to working with you on public land issues, BLM issues, and hope that we can have a good relationship and hope we can have the opportunity to call upon you when we have problems that concern our individual states or the committee or the Minority party.

Mr. BACA. Congressman, thank you very much. And I am fully aware of Project Bold. I met with a delegation, Kevin Carter and a crew from the State land office, I guess, about two, three weeks

ago. They came by for a courtesy call. And having been in their shoes before, I know exactly what they are getting at.

Mr. VENTO. I would just point out that at the request of Congressman Hansen and Congresswoman Shepherd, the subcommittee had a hearing at about that same time on the matter. And it was my impression, Mr. Baca, that BLM and the State really were together. It seemed like the BLM had put in a lot of work.

I think this is one instance where you can say the former administration and others had provided a good foundation for work on this matter, and I might say not least of which was my staff and other staff of the subcommittee here, who have done a lot of work on the matter. So it is, we hope, in suitable condition and posture that we can move on it within the near future.

We are still looking at it, so if you have any additional comments or concerns about it that were not already expressed at the hearing on the part of the administration by Mr. Penfold, we hope you will let us know.

Well, I have no further questions myself. I might say there were a lot of good intentions on the part of Members to be here, not least of which was the Chairman. But as the day wears on, our schedule tends to pick up more and more activities, and so it is a real strain to break away.

And of course there was an expectation by some members, I think, that you would have been here early this morning, although we did announce that we were going to hear you later in the day. But in any case, some were waiting here for you or were at least here waiting for me and for you this morning.

Of course, I appeared late. You appeared when you said you would. So in any case, that being said, I am sure you will understand the reason that they are not here and I'm sure that you will be seeing probably more of them than you might always want.

In any case, with that said, the meeting stands adjourned. Thanks, Director Baca. Thank you, Jim.

[Whereupon, at 2:33 p.m., the subcommittee was adjourned.]



# APPENDIX

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TUESDAY, MAY 25, 1993

## ADDITIONAL MATERIAL SUBMITTED FOR THE HEARING RECORD

STATEMENT OF

KAREN SHEPHERD

U.S. REPRESENTATIVE, SECOND DISTRICT, STATE OF UTAH

BEFORE THE SUBCOMMITTEE ON NATIONAL PARKS,  
FORESTS AND PUBLIC LANDS  
OF THE COMMITTEE ON NATURAL RESOURCES  
103RD CONGRESS, 1ST SESSION

ON H.R. 1603

MAY 25, 1993

Mr. Chairman, today we are here to discuss modifications to the Federal Land Management and Policy Act. In a state such as Utah, where almost two-thirds of the land is owned by the federal government, any modification in the way the BLM does business is taken very seriously indeed. H.R. 1603 contains new provisions addressing National Conservation Areas and Areas of Critical Environmental Concern that will have a direct impact on the economy and lifestyle of many of Utah's citizens. I also draw attention to that part of the bill which begins to address the significant loss of salt from the Bonneville Salt Flats. Site of several world land speed records, salt has been leeching from this area for years as a result of human intervention and now this most unique desert area is threatened. I am pleased to see this concern addressed in the bill.

Despite the broad impact of these amendments to FLPMA, however, the focus of opposition to this bill appears to be on the provisions addressing R.S. 2477 roads. With Utah claiming 3,815 out of 3,947 of these potential roads, almost 97% of the pending applications, Utah has a large stake in how the issue of historic highways across federal lands is resolved.

While the headlines have shouted that this issue will either destroy Utah's economy or put an end to the possibility for wilderness designation, I don't believe that this latest battle is about access to federal lands. The Federal Land Management and Policy Act already provides ample opportunity to receive a permit for whatever right-of-way may be necessary across federal lands. Furthermore, it is well known that the BLM is not stingy about issuing such permits. In fact, if an application for an R.S. 2577 right-of-way is denied, it is the BLM's policy to immediately offer the opportunity for a FLPMA right-of-way permit. If these things are not true, then perhaps we need to revisit those provisions of FLPMA that address rights-of-way.

I believe that this is an issue of federal land-use planning. If we are to move away from these seemingly constant battles of control over western public lands, then it is incumbent upon each one of us to collaborate on a comprehensive plan to manage our nation's lands. We must set



goals and offer direction but also preserve flexibility for our designated caretakers. It is only by expanding our management options will we finally begin to avoid the constant battles waged over endangered species, water, rangeland condition, timber harvests, wilderness and other well-known disputes.

In preparing for this hearing today, I was struck by other things that were happening in 1866 other than the passage of the language now referred to as "R.S. 2477". The Civil War had just come to an end. Families that had been pulled apart, at times irrevocably, and exhausted by war were drawn by the prospect of a new beginning and were heading West in great numbers. The country was in great debt as a result of that war and the Congress was attempting to find a way to pay those debts. But although it was a somber time for the country, something else much more hopeful was afoot. We, as a nation, were beginning to plan for the future of our public lands. In 1872, for example, the same year that the General Mining Law was passed, a farsighted decision was made to set aside Yellowstone National Park to preserve and protect the unique natural resources of that ecosystem.

Now, more than 120 years later, we find ourselves in a similar place. The country is deeply in debt. Families are hurting. We must find a way to help this country out of its problems. But yet we also must have the courage to stop and look closely at what we have and how we can make some of the thoughtful, farsighted decisions affecting our public lands that hopefully will endure for another 120 years. Since the BLM is charged with managing about 270 million acres of this nation's public lands, I think that this bill, specifically as it relates to R.S. 2477 roads, is a good place to begin.

I believe that many of our problems on public lands result from attempting to piece our land management policies together in crazy quilt fashion while all the time focusing only on a small portion of the hoped-for finished product at a time. The difference is that although a carefully planned and crafted quilt is a thing of beauty, land management based not on careful planning but on reaction to every crisis only results in holes and ragged edges. It is no surprise that federal land management agencies are currently engaged in "gap analysis" to determine what they do not know.

But I hope times are changing. I believe that we as a people have grown weary of the constant conflict and polarization. I believe that the creative abilities of everyone engaged in this most recent crisis could be better served by planning for the final product instead of attempting to force one more piece into an already hopelessly confused undertaking.

I challenge the very capable witnesses we have appearing before the subcommittee today to tell us why R.S. 2477 roads are necessary and how they fit into a sound land management scheme. I want to know why the FLPMA rights of way permits that are given out by the BLM like candy at a parade are not adequate to serve the needs of the rural west. In Utah, if the wilderness designation process is the real target of this latest crusade, and I suspect it is, then let's address BLM wilderness in Utah. Subterfuge and gamesmanship is a waste of time and resources.

In an age where we are beginning to understand the need for great plant and animal diversity and the need for management of ecosystems as a unit, we must define a new paradigm. We must fold solid scientific research into our public policy decisions. We must provide a foundation for good land management decisions now and into the future.

I believe that whether some of these roads to nowhere are authorized under R.S. 2477 or under FLPMA is not as important a question as whether this fight is a wise use of our human and financial resources. And a bid to fight for each road under R.S. 2477 would be a long, bitter and enormously expensive battle.

I believe that it is a mistake to allow random and unplanned development of roads across the public lands. I am sure that many a town council has regretted the helter-skelter development of former decades and would fight indignantly if another entity was given authority to disregard without notice the careful city plans of today.

We need to expand our options, not limit them. To take away discretion is to limit the tools afforded our land managers to do the job we so much want done. Yellowstone National Park endures not only because of the forethought of a few, but also because of the dedication and commitment of the many scientists and managers who have worked to plan and care for all of the pieces of the ecosystem.

In the words of Aldo Leopold, "Quit thinking about land-use as solely an economic problem. Examine each question in terms of what is ethically and aesthetically right, as well as what is economically expedient. A thing is right only when it tends to preserve the integrity, stability, and beauty of the community; and the community includes the soil, water, fauna and flora, as well as the people."

STATEMENT  
THE HONORABLE MICHAEL D. CRAPO  
BEFORE THE SUBCOMMITTEE ON  
NATIONAL PARKS, FOREST, AND PUBLIC LANDS

MR. CHAIRMAN: THANK YOU FOR THE OPPORTUNITY  
TO APPEAR BEFORE THIS SUBCOMMITTEE TO PRESENT  
TESTIMONY REGARDING REAUTHORIZATION OF  
OF THE BUREAU OF LAND MANAGEMENT FOR FISCAL  
YEARS 1994 THROUGH 1997. THE SECTION OF THIS  
BILL THAT IS OF CONCERN TO MY STATE OF IDAHO  
IS THAT WHICH COVERS REVISED STATUTE 2477.  
AS THE BILL IS CURRENTLY WRITTEN, H.R. 1603  
WOULD REQUIRE THAT ALL R.S. 2477 CLAIMS BE  
FILED ON OR BEFORE JANUARY 1, 1994. THIS  
TIME FRAME IS MUCH TOO SHORT. ANY TIME FRAME  
IMPOSED SHOULD ALLOW ALL STATES THE  
OPPORTUNITY TO DEVELOP LEGISLATION AND AN  
APPROPRIATE FILING TIME WITHIN WHICH TO  
REGISTER THEIR R.S. 2477 CLAIMS.

IN THE STATE OF IDAHO, ON MARCH 25, 1993,  
GOVERNOR CECIL ANDRUS SIGNED INTO LAW, HOUSE  
BILL NUMBER 388. THIS ACT RELATES TO  
HIGHWAYS AND FEDERAL LAND RIGHTS OF WAY AND  
AMENDS SECTION 40-107, OF THE IDAHO CODE TO  
DEFINE FEDERAL LAND RIGHTS OF WAY AND AMENDS  
CHAPTER 2, TITLE 40, IDAHO CODE, BY THE  
ADDITION OF A NEW USE, VALIDATION AND  
ACKNOWLEDGEMENT OF FEDERAL LAND RIGHTS OF  
WAY.

UNDER THIS NEW LAW THE STATE OF IDAHO  
RECOGNIZES THAT EXISTING FEDERAL LAND RIGHTS  
OF WAY ARE EXTREMELY IMPORTANT TO ALL OF  
IDAHO'S CITIZENS. TWO-THIRDS OF IDAHO'S LAND  
IS UNDER CONTROL OF THE FEDERAL GOVERNMENT  
AND ACCESS TO SUCH FEDERAL LANDS IS INTEGRAL  
TO PUBLIC USE. THE IDAHO STATE LEGISLATURE



RECOGNIZED THE NECESSITY FOR ESTABLISHING  
FEDERAL RIGHTS OF WAY, TO PROTECT THOSE  
RIGHTS PREVIOUSLY GRANTED TO AND VESTED IN,  
THE CITIZENS OF IDAHO. IT IS IMPORTANT THAT  
THE FEDERAL GOVERNMENT ALSO RECOGNIZE THE  
IMPORTANCE OF THOSE RIGHTS. CONGRESS CAN DO  
THIS BY AMENDING H.R. 1603 TO PROVIDE  
ADEQUATE TIME TO ALLOW FILING ON THESE  
RIGHTS. THEREFORE, I REQUEST THE FILING  
DEADLINE BE EXTENDED TO AT LEAST JANUARY 1,  
1997. IT IS CRITICAL THAT THIS ADDITIONAL  
TIME BE PROVIDED. JANUARY 1, 1997 WILL  
PROVIDE THAT NEEDED TIME.

MR. CHAIRMAN: THE PEOPLE OF IDAHO, THROUGH  
THEIR STATE LEGISLATURE AND GOVERNOR CECIL  
ANDRUS, FORMER SECRETARY OF INTERIOR UNDER  
PRESIDENT JIMMY CARTER, AGREED THAT PUBLIC

## IN THE HOUSE OF REPRESENTATIVES

## HOUSE BILL NO. 388

## BY STATE AFFAIRS COMMITTEE

## AN ACT

RELATING TO HIGHWAYS AND FEDERAL LAND RIGHTS OF WAY; EXPRESSING LEGISLATIVE INTENT; AMENDING SECTION 40-107, IDAHO CODE, TO DEFINE FEDERAL LAND RIGHTS OF WAY; AMENDING CHAPTER 2, TITLE 40, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 40-204A, IDAHO CODE, TO PROVIDE FOR DOCUMENTATION, ABANDONMENT, USE, VALIDATION AND ACKNOWLEDGEMENT OF FEDERAL LAND RIGHTS OF WAY; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. STATEMENT OF LEGISLATIVE INTENT. The State of Idaho recognizes that existing federal land rights of way are extremely important to all of Idaho's citizens. Two-thirds of Idaho's land is under control of the federal government and access to such federal lands is integral to public use. The Idaho State Legislature recognizes the necessity for establishing a procedure for identifying and confirming the existence of previously established federal rights of way, to protect those rights previously granted to and vested in, the citizens of Idaho.

SECTION 2. That Section 40-107, Idaho Code, be, and the same is hereby amended to read as follows:

## 40-107. DEFINITIONS -- F.

(1) "Facilities" mean tracks, pipes, mains, conduits, cables, wires, towers, poles, equipment and appliances.

(2) "Family" means two (2) or more persons living together in the same dwelling unit who are related to each other by blood, marriage, adoption or legal guardianship.

(3) "Farm operation" means any activity conducted primarily for the production of agricultural products or commodities, including timber, for sale and home use, and producing agricultural products or commodities in sufficient quantity to contribute materially to the operator's support.

(4) "Feeder highway" means any highway which, in the opinion of the transportation board, is needed to create or facilitate access to a turnpike project upon which a toll is charged for transit.

(5) "Federal land rights of way" mean rights of way on federal land within the context of Revised Statute 2477, codified as 43 United States Code 932, and other federal access grants and shall be considered to be any road, trail, access or way upon which construction has been carried out to the standard in which public rights of way were built within historic context. These rights of way may include, but not be limited to, horse paths, cattle trails, irrigation canals, waterways, ditches, pipelines or other means of water transmission and their attendant access for maintenance, wagon roads, jeep trails, logging roads, homestead roads, mine to market roads and all other ways.

SECTION 3. That Chapter 2, Title 40, Idaho Code, be, and the same is hereby amended by the addition thereto of a NEW SECTION, to be known and designated as Section 40-204A, Idaho Code, and to read as follows:

40-204A. FEDERAL LAND RIGHTS OF WAY. (1) The state recognizes that the act of construction and first use constitute the acceptance of the grant given to the public for federal land rights of way, and that once acceptance of the grant has been established, the grant shall be for the perpetual term granted by the congress of the United States.

(2) The only method for the abandonment of these rights of way shall be that of eminent domain proceedings in which the taking of the public's right to access shall be justly compensated. Neither the mere passage of time nor the frequency of use shall be considered a justification for considering these rights of way to have been abandoned.

(3) All of the said rights of way shall be shown by some form of documentation to have existed prior to the withdrawal of the federal grant in 1976 or to predate the removal of land through which they transit from the public domain for other public purposes. Documentation shall take the form of at least a map, and an affidavit. Surveys, books and other historic information may also be included.

(4) These rights of way shall not require maintenance for the passage of vehicular traffic, nor shall any liability be incurred for injury or damage through a failure to maintain the access or to maintain any highway sign. These rights of way shall be traveled at the risk of the user and may be maintained by the public through usage by the public.

(5) Any member of the public, the state of Idaho and any of its political subdivisions, and any agency of the federal government may choose to seek validation of its rights under law to use granted rights of way either through a process set forth by the state of Idaho, through processes set forth by any federal agency or by proclamation of user rights granted under the provisions of the original act, Revised Statute 2477.

These rights of way shall not be required to possess centerline surveys typical of publicly maintained roads, but shall be surveyed prior to being accepted into the maintained public highway system.

Neither the granting of the original right of way nor any provision in this or any other state act shall be construed as a relinquishment of either federal ownership or management of the surface estate of the property over which the right of way passes.

(6) Persons seeking acknowledgement of federal land rights of way shall file with the county recorder the request for acknowledgement and for any supporting documentation. The county recorder shall place the acknowledgement on the official county road system map.

SECTION 4. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

## IN THE HOUSE OF REPRESENTATIVES

## HOUSE JOINT MEMORIAL NO. 6

## BY STATE AFFAIRS COMMITTEE

## A JOINT MEMORIAL

TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES IN CONGRESS ASSEMBLED, AND TO THE CONGRESSIONAL DELEGATION REPRESENTING THE STATE OF IDAHO IN THE CONGRESS OF THE UNITED STATES.

We, your Memorialists, the House of Representatives and the Senate of the State of Idaho assembled in the First Regular Session of the Fifty-second Idaho Legislature, do hereby respectfully represent that:

WHEREAS, western United States territories, before and after joining the Union of States, presented unique transportation and settlement challenges with little or no governmental oversight; and

WHEREAS, the 1800's saw this western settlement occur with sometimes unorganized surges of immigrants who had no governmental authority to guide them in the establishment of roads, schools, village boundaries, township lines and related infrastructure; and

WHEREAS, economic opportunities attracted thousands of settlers who traversed the lands in search of gold and other minerals, furs and homesteads and who caused to be constructed roads, paths and trails for the common use; and

WHEREAS, Congress in 1866 amended the mining law in order to recognize legal rights-of-way for those roads, paths and trails by adding Section 2477, commonly referred to as Revised Statute 2477; and

WHEREAS, many of the surface trails for horses, dog teams and man became permanent transportation links between settlements; and

WHEREAS, the phases of exploration, settlement and transportation did occur concurrently, in intervening years, and in current times in Alaska and other western states where the Revised Statute 2477 grants are still applicable; and

WHEREAS, there is a growing threat to surface access to private "inholding" properties in some conservation units, certain national parks and wildlife designations, and in other federal land withdrawals; and

WHEREAS, there are increased efforts to pressure Congress to extinguish the Revised Statute 2477 authorization and grants.

NOW, THEREFORE, BE IT RESOLVED by the members of the First Regular Session of the Fifty-second Idaho Legislature, the House of Representatives and the Senate concurring therein, that we urge Congress to recognize its legal and historic commitment, under Revised Statute 2477, to rights-of-way access to unreserved, or formerly unreserved, public lands.

BE IT FURTHER RESOLVED that the Chief Clerk of the House of Representatives be, and she is hereby authorized and directed to forward a copy of this Memorial to the President of the Senate and the Speaker of the House of Representatives of Congress, and the congressional delegation representing the State of Idaho in the Congress of the United States.





# National Audubon Society

ROCKY MOUNTAIN REGIONAL OFFICE

4150 DARLEY, SUITE 5, BOULDER, COLORADO 80303 (303) 499-0219

7 June 1993

Honorable Bruce F. Vento  
Chairman  
Subcommittee on National Parks,  
Forests and Public Lands  
House Annex 1 - Room 812  
Washington, DC 20515

Dear Mr. Chairman:

This letter is submitted for inclusion in the record of the hearing on H.R. 1603, a bill authorizing appropriations for the Bureau of Land Management (BLM).

The National Audubon Society supports the Chairman's efforts to improve the management of public lands. We very much like the tone of this legislation, and are pleased at the intent to protect such resources as biodiversity, plant communities, native species and communities, and riparian areas.

Some aspects of H.R. 1603 are especially important to Audubon, and the following comments highlight those areas:

## Sec. 3(a) Areas of Critical Environmental Concern

The Areas of Critical Environmental Concern (ACEC) designation is an important habitat conservation tool on the public lands, and we believe that the proposed definition of ACEC is an improvement over existing law. We particularly support (a)(3), which establishes that an ACEC can be designated in order to protect or enhance the resources and values of a "conservation system unit."

We note in (a)(1) "that Congress does not intend that the Secretary establish protective perimeters or buffer zones around such areas" (i.e., ACECs). There may be cases, however, where special management of adjacent lands is required to fully protect resources within an ACEC. We hope that nothing in this provision precludes special management of areas adjacent to ACECs, extensions of ACECs, or land exchanges to fully protect resources within ACECs. A proposed quarry adjacent to the Jackson Canyon ACEC, which was established near Casper, Wyoming to protect wintering bald eagles, is a case in point. The proposed quarry is on state land, but

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the BLM is being urged to arrange a land exchange to give the state appropriate lands at a location where eagles using the ACEC would not be threatened or disturbed.

#### Sec. 4. Major Uses and Inventories

In paragraph (a), we recommend adding migratory bird habitats to the list of major uses. For example, (1) could be amended as follows: "maintenance of fish and wildlife populations and habitats, including for migratory birds,..."

The Secretary of the Department of the Interior, on behalf of the U.S. Government, is charged with implementation of at least five international conventions and several domestic laws related to the protection of migratory birds and their habitats (e.g., migratory bird treaties with Canada, Mexico, Japan, and Russia; Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere; and Section 13 of the Fish and Wildlife Conservation Act). Although traditionally the U.S. Fish and Wildlife is the agency that has carried out most actions under these agreements, the responsibilities are department and government wide.

The status and management of public lands is enormously important to the conservation of migratory birds in western states, Alaska, and even in eastern states (see below). Explicit recognition of the need to protect migratory bird habitats will encourage and assist BLM in developing and executing management plans that protect the full range of natural resources dependent on public lands.

#### Sec. 5. Planning Requirements

Under Section 5(a) Deadlines, Audubon strongly supports the language requiring completion of land use plans for all public lands outside of Alaska no later than January 1, 1998.

We recently requested information from BLM on the status and management of some 30,000 acres of public lands in eastern states that, according to the BLM "Nongame Migratory Bird Habitat Conservation Plan" (p. 5), may provide "immeasurable value to nongame birds during migration." Unfortunately, we discovered that BLM apparently does not know how many acres of land it actually owns in eastern states and, therefore, there is little management for or protection of migratory bird populations and habitats on these areas. Rapid completion of land use plans for all public lands, including those in eastern states, is essential if BLM is to maintain, much less improve, its stewardship of natural resources.

Under Section 5(b) Criteria, we commend the Chairman for addition of "riparian areas" as a priority in the development and revision of land use plans. As recommended above for the definition of major uses, we suggest adding the phrase,

"including migratory birds," following "fish and wildlife" in the list of resources and values to be identified, protected, and enhanced in riparian areas.

In western states riparian habitat is probably the single most important and threatened habitat type for migratory birds. In the Southwest, for example, 75 percent of the bird species nest primarily in riparian habitat. In Idaho, 60 percent of the migrant landbirds are associated with riparian habitats, and in northern Colorado, 82 percent of all breeding species occur in riparian vegetation.

Thus, we strongly support inclusion of riparian areas among the priorities for development and revision of land use plans, and we request specific mention of migratory birds among the resources to be protected in riparian areas.

#### Sec. 19. National Conservation Areas

Audubon is pleased to see inclusion of Section 19 in H.R. 1603. Creation of National Conservation Areas, such as along San Pedro River in Arizona, is essential for the management and protection of many species of migratory birds and other resources. We have two suggestions:

First, under Section 19(a)(1), should the definition of a National Conservation Area track some of the language in Section 3(d) of H.R. 236 (Snake River legislation)? The Snake River legislation provides that "subject to valid existing rights, the Federal lands within the conservation area are hereby withdrawn from all forms of entry, appropriation, or disposal under the public land laws..."

Second, we suggest that (C) be improved by adding the following: "and no uses shall be permitted which are detrimental to such management purposes." With addition of this language, not all uses of an area would have to further its management purposes, but none could be harmful to those management purposes.

#### Nongame Migratory Bird Habitat Conservation Plan

In addition to the many fine provisions in H.R. 1603, we recommend adding a new section requiring a report from BLM on the status and implementation of its "Nongame Migratory Bird Habitat Conservation Plan, which was prepared as a component of "Fish and Wildlife 2000." We suggest a one-year deadline for such a report.

As noted above, the Secretary of the Department of the Interior has a number of treaty and domestic responsibilities related to migratory birds, including for "nongame" species (i.e., not just game species, such as various ducks and geese). If the Secretary is to fulfill these responsibilities, and, more importantly, keep more species of birds from becoming Threatened or Endangered, it is essential that we

H.R. 1603

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work pro-actively to monitor, manage, and conserve migratory bird populations and habitats. The millions of acres of public lands managed by BLM provide habitat for about 250 species of migratory nongame birds and are of tremendous importance to maintaining their populations.

Audubon commends BLM for developing its Nongame Migratory Bird Habitat Conservation Plan, designating a nongame bird program manager (based in Boise, Idaho), and participating in Partners in Flight, an umbrella program involving more than 80 federal and state agencies and nongovernmental organizations. Indeed, BLM plays a key role in Partners in Flight, and the importance of BLM lands is widely recognized as crucial to the realization of Partners in Flight objectives.

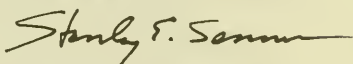
We have reviewed BLM's nongame bird habitat plan and find that it does a good job of identifying needs and setting forth goals for BLM in the areas of inventory and monitoring, habitat management, research and studies, training, and domestic and international partnerships. Although the plan identifies a need for \$4.7 million in Fiscal Year 1994, we are not aware that BLM has been appropriated any funds specifically to implement the plan.

We think it is timely for the Subcommittee and Congress to review the content, priorities, and implementation of the plan, especially in relation to BLM's "Riparian-Wetland Initiative for the 1990s" and the status and management of BLM lands in the eastern states. We would be happy to work with the Subcommittee to suggest specific language for a study requirement related to BLM's nongame bird habitat plan.

#### Conclusion

We thank you again for your efforts to improve the management of public lands. We believe that H.R. 1603 advances those efforts and it has our support. We have noted several areas where we think that the legislation can be improved, and we are eager to work with you and your staff as you consider these suggestions.

Sincerely,



Stanley E. Senner  
Director  
Migratory Bird Program

cc: Jim Waltman  
NAS Wildlife Policy Specialist





# United States Department of the Interior

## NATIONAL PARK SERVICE

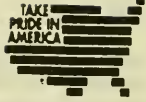
Rocks Mountain Region

Utah State Office

324 South State

P.O. Box 45155

Salt Lake City, Utah 84145-0155



1-19

IN REPLY REFER TO

L3027 (RMR-UT)

January 14, 1993

### Memorandum

To: R.S. 2477 Task Force Leader  
 From: Utah State Coordinator, National Park Service  
 Subject: National Park Service Response to House Report 102-901

Enclosed is the National Park Service response to House Report 102-901. Due to the difference in legislative authorities applicable to Alaska, the parks in that region are addressed separately in the report. Please contact me if I can assist further in this matter.

*Martin C. Ott*  
 Martin C. Ott

RS 2477: NPS Response to House Report 102-901

The following information on RS 2477 was compiled to assist preparation of the report required by the 1993 Appropriations Committee Directives. Also, issues and alternatives that could be addressed in the report are noted. Due to the differences in legislative authorities applicable to Alaska, the parks in that region are addressed in a separate section of this report.

History: RS 2477 in National Park System

RS 2477 was enacted on July 26, 1866, and repealed on October 21, 1976, subject to valid existing rights. As this Act was applicable only to Public Land states and considering the date of the Act, NPS areas east of Colorado are unlikely to be affected.

Unreserved public lands in the western NPS units were open to RS 2477 from July 26, 1866, until the withdrawal for park purposes or until October 21, 1976, whichever was earlier. Not all western NPS units were created prior to the 1976 repeal of RS 2477.

In 1985, the DOI convened a task force on RS 2477 consisting of the Alaska offices of the DOI land managing bureaus, the State of Alaska, and other interested parties. A second RS 2477 task force consisting of the Alaska offices of the DOI land managing bureaus convened in 1987. The 1987 task force submitted a draft policy on RS 2477 to the Washington, D.C., office of the Bureau of Land Management (BLM) in July of 1987.

On December 7, 1988, the DOI adopted a policy prepared by the BLM after consultation with the State of Alaska and review by the other DOI land managing bureaus. This policy established criteria for evaluating possible RS 2477 rights-of-way and directed DOI land managing bureaus to develop internal procedures to administratively recognize possible RS 2477 rights-of-way that meet the criteria.

Status: RS 2477 Rights-of-way in NPS Units Other Than Alaska

Currently, no RS 2477 rights-of-way have been administratively recognized in NPS units. Several such rights-of-way have been judicially determined to exist, such as the Glade Park Road at Colorado National Monument, Colorado and the Burr Trail at both Capitol Reef National Park and Glen Canyon National Recreation Area in Utah.

The only NPS areas where RS 2477 assertions are currently pending are in Utah. An assertion by Kane County, Utah, of a 12 mile section of the Warm Creek Road within Glen Canyon National Recreation Area has been reviewed and a recommendation made to administratively acknowledge part of this claimed right-of-way. Two other rights-of-way have been asserted, but insufficient information has been provided to permit review of these assertions. Several rights-of-way are claimed in Washington and Idaho but have not been formally asserted.

While assertions of RS 2477 rights-of-way in other western NPS units are not currently pending, such are to be expected in the future. The current "wise use" movement, which is gaining momentum in the west, sees RS 2477 rights-of-way as a means of assuring access to areas which might otherwise be segregated in wilderness or parks.

Impact: RS 2477 Rights-of-way in National Park Units

The impact of RS 2477 rights-of-way in National Park units could be devastating. The actual impact will depend on how many potential rights-of-way are validated, what resources they affect, how each right-of-way is used, and to what extent the NPS is allowed to manage valid RS 2477 rights-of-way.

(1) Number of RS 2477 rights-of-way

It is impossible to determine at this time how many possible RS 2477 rights-of-way will be validated. National Park Service areas within the following four NPS regions (excluding Alaska) could be affected:

|                          |                            |
|--------------------------|----------------------------|
| Pacific Northwest Region | 11 areas (2,212,855 acres) |
| Western Region           | 21 areas (8,189,103 acres) |
| Rocky Mountain Region    | 27 areas (6,782,804 acres) |
| Southwest Region         | 9 areas (495,865 acres)    |

(2) Affected Resources

Congress established the National Park System to conserve scenic, natural, historic, and wildlife resources for the enjoyment of current and future generations. Possible RS 2477 rights-of-ways in NPS areas could cross many miles of undisturbed fish and wildlife habitat, historical and archeological resources, and sensitive wetlands. Wilderness or potential wilderness could also be crossed by potential RS 2477 rights-of-ways.

Validation of possible RS 2477 rights-of-way assertions would undoubtedly derogate most unit values and seriously impair the ability of the NPS to manage the units for the purposes for which they were established.

(3) Use

Most public highway use of possible RS 2477 rights-of-way has been by horse-drawn wagon, foot, horseback, 4-wheel drive vehicle, and, in recent years, passenger vehicle. Historically, RS 2477 rights-of-way were used for access to cattle operations and mining claims, and to exercise other private property rights. Many possible RS 2477 rights-of-way have been long disused; others are currently used as public highways. State and local governments as well as individual interests have given recent indication that assertions for RS 2477 rights-of-way may be made for various purposes including mining, ranching, resource extraction, and diverse economic development pursuits. If validated, these assertions will have a severe negative impact on areas managed by the NPS, not only from the rights-of-way themselves but from the associated development.

(4) Management

The NPS has considerable authority to manage validated RS 2477 rights-of-way to prevent derogation of national park values. There is common thought among state and local governments that federal land management agencies have no control over use of RS 2477 rights-of-way, but federal case law suggests otherwise. In Sierra Club v. Hodel (Burr Trail), 848 F. 2d 1068 (10th Cir. 1988), the court found that the BLM has the authority and responsibility to regulate RS 2477 rights-of-way to prevent undue degradation of federal land. In U.S. v. Vogler, 859 F. 2d 638 (9th Cir., 1988) and Wilkenson v. Department of the Interior, 634 F. Supp. 1265 (D. Colo. 1986), the courts found that the NPS can regulate RS 2477 rights-of-way. The Vogler court stated that the

Organic Act of the NPS [16 USC §1] and the Mining in the Parks Act [16 USC §1902] authorize the NPS to prevent derogation of park values.

(5) Conclusion

Potentially, there are thousands of possible RS 2477 rights-of-way in the western units of the National Park Service. Many of these possible rights-of-way are extensive and, if validated, would impair scenic, natural, historic, wildlife, and wilderness resources. Also impaired would be the ability of the NPS to manage its areas for purposes for which they were established. The NPS may be able to mitigate some impact pursuant to applicable law and regulations if current federal case law withholds future challenge.

Impact: Access to National Park Units

Access to national park units generally does not currently rely on RS 2477 rights-of-way. Future planning may identify RS 2477 rights-of-way that could provide such access. However, it is not expected that this would be a common circumstance.

Alternatives: Public Highways in National Park System Units

The NPS has no general authority to approve improved public highways across a national park unit unless the highway would serve NPS administration [16 USC §8], would be within the Federal-aid highway system [23 USC §317], or, in Alaska, would be necessary to provide adequate and feasible access to inholdings for economic and other purposes [ANILCA §1110 (b)].

At a few NPS areas the establishing legislation authorizes the granting of rights-of-way for highway purposes, thus providing an alternative to RS 2477. Congress can, of course, legislate access across any area.

Alternatives: Assessing the Validity of RS 2477 Rights-of-way

(1) Continue Current DOI Policy on RS 2477

Under this alternative, the National Park Service will implement DOI policy when Service-wide procedures are finalized. Draft procedures produced by the Alaska and Rocky Mountain Regions were submitted to the Washington, D.C., office of the NPS for review and adoption in November 1992. The Alaska Region, NPS, has delayed review of two current assertions pending completion of the procedures. Rocky Mountain Region has adopted the draft procedures on an interim basis to guide the processing of urgent cases.

(2) Review and Revise DOI Policy on RS 2477

Revision of the DOI policy could emphasize that administrative recognition is a discretionary action that will be taken only when a possible RS 2477 right-of-way would clearly be validated by a court of competent jurisdiction; all borderline and doubtful assertions would be denied administrative recognition and would need to be validated by the courts.

Elements of the current DOI policy the NPS recommends for revision include:



- The policy should require a formal assertion of possible RS 2477 rights-of-way for administrative recognition by DOI land managing bureaus.
- The policy should require incontrovertible documentation for an asserted RS 2477 right-of-way to qualify for administrative recognition and direct DOI land managing bureaus to withhold administrative recognition if an assertion does not provide adequate documentation. Although this may result in more litigation than the current policy, it would accurately reflect the Congressional intent to retain federal control over public land.
- The policy should explicitly recognize existing management authorities available to DOI land managing bureaus and state the standard of protection available under such authorities. The NPS is authorized to prevent derogation of values pursuant to the Organic Act of the NPS, the Mining in the Parks Act, etc. This would clarify Congressional intent and facilitate efficient land management.
- The policy's definition of construction should require actual and intentional modification of land for the purpose of creating a highway. Although this may not conform to all applicable state laws, it is an appropriate general standard for administrative recognition of possible RS 2477 rights-of-way by DOI land managing bureaus.
- The policy's definition of construction could explicitly exclude survey, planning, or proclamation as qualifying actions. The policy could clearly state that DOI land managing bureaus will not administratively recognize unconstructed section line easements as RS 2477 rights-of-way.
- The policy should define "abandonment" and direct DOI land managing bureaus to withhold administrative recognition of possible RS 2477 rights-of-way in the event of demonstrable long-standing disuse as a public highway. Although this may not conform to all applicable state laws, it is an appropriate general standard for administrative recognition of possible RS 2477 rights-of-way by DOI land managing bureaus.
- The policy should address seasonal rights-of-way and direct DOI land managing bureaus to limit administrative recognition of rights-of-way to the season for which a right-of-way was accepted. The policy could also state that rights-of-way that have to be remarked annually, were never physically modified for public highway purposes, and vary in location depending on weather conditions and will not be administratively recognized by DOI land managing bureaus.
- The policy should address designated and proposed wilderness and state that DOI land managing bureaus will not administratively recognize RS 2477 rights-of-way in such areas. Administrative recognition of RS 2477 rights-of-way in such areas contradicts the Congressional intent of the Wilderness Act.
- The policy should require coordination between all agencies affected by an RS 2477 assertion to ensure consistent application of the policy.

(3) Revoke DOI Policy

Under this alternative, the DOI could revoke the current policy and require all assertions of RS 2477 rights-of-way to be submitted to a court of competent jurisdiction for a determination of validity. This would clearly implement the Congressional mandate to retain control of federal lands, but it may result in avoidable litigation and contravene the mandate for efficient management of federal lands.

(4) Congressional Alternatives

Congress has several alternatives to address RS 2477 that could be addressed:

- Congress could legislatively delegate the authority to adjudicate the validity of RS 2477 rights-of-way to the appropriate agencies. This would allow DOI land managing bureaus to determine validity in light of their Congressional mandates and change the courts' role to review of administrative process rather than review of the facts.
- Congress could set a deadline to assert RS 2477 rights-of-way. This would facilitate efficient land management by identifying all possible RS 2477 rights-of-way and, eventually, all valid RS 2477 rights-of-way. This would, however, require additional appropriations for all affected federal land managers to respond to assertions in a timely manner.
- The policy should address the intent of the original 1866 Act. It seems unlikely that Congress intended a total abdication of control over the public lands as even the RS 2477 grant is subject to the restriction that the lands be unreserved for public purposes.

RS 2477: Alaska Regional Office Response to House Report 102-901History: RS 2477 in Alaska National Park Units

RS 2477 was enacted on July 26, 1866, and appealed on October 21, 1976, subject to valid existing rights. According to the Alaska Regional Solicitor, RS 2477 was extended to the Territory of Alaska by the Organic Act of May 17, 1884 (23 Stat. 24). Therefore, unreserved public lands in Alaska were open to RS 2477 from Alaska May 17, 1884, until October 21, 1976.

All lands within the fifteen Alaska national park units were reserved and closed to RS 2477 prior to repeal of the statute:

- part of Sitka National Historical Park was reserved in 1890;
- part of Denali National Park was reserved in 1917;
- part of Katmai National Park was reserved in 1918;
- part of Glacier Bay National Park was reserved in 1925;
- all lands in Alaska were reserved on December 14, 1968, when the withdrawal application for Public Land Order (PLO) 4582 was posted.

This list is not exhaustive and other areas in Alaska national park units than those noted may have been reserved prior to PLO 4582.

In 1985, the DOI convened a task force on RS 2477 consisting of the Alaska offices of the DOI land managing bureaus, the State of Alaska, and other interested parties. A second RS 2477 task force consisting of the Alaska offices of the DOI land managing bureaus convened in 1987. The 1987 task force submitted a draft policy on RS 2477 to the Washington, D.C. office of the Bureau of Land Management (BLM) in July of 1987.

On December 7, 1988, the DOI adopted a policy prepared by the BLM after consultation with the State of Alaska and review by the other DOI land managing bureaus. This policy established criteria for evaluating possible RS 2477 rights-of-way and directed DOI land managing bureaus to develop internal procedures to administratively recognize possible RS 2477 rights-of-way that meet the criteria.

Status: RS 2477 Rights-of-way in Alaska National Park Units

Currently, no RS 2477 rights-of-way have been validated by a court or administratively recognized in Alaska national park units. The Alaska Region of the NPS has received only two RS 2477 assertions. Both were submitted by inholders in Wrangell-St. Elias National Park and Preserve. The first assertion was received in August 1990, for a one-mile right-of-way in the preserve. The second assertion was received in March 1992, for two routes: a 20-mile right-of-way in the Park and designated wilderness; and a 20-mile right-of-way in the Park.

The Alaska Region of the NPS has deferred review and administrative determinations of RS 2477 assertions pending completion of Service-wide procedures for RS 2477 assertions. In the interim, the two parties who have submitted assertions have been assured alternative access to their inholdings pursuant to other applicable law and regulations.

The Alaska Regional of the NPS has not received any RS 2477 assertions from the State or local governments. In 1974 the State of Alaska presented the BLM with an atlas of trails. This atlas identifies 1,700 trails throughout the

State including approximately 200 trails in Alaska national park units. Several of the trails identified cross over 100 miles of one of the Alaska national park units.

The State contends that the 1974 trail atlas asserted all 1,700 trails as RS 2477 rights-of-way. The Alaska State Office of the BLM, however, determined that the atlas does not provide sufficient information to constitute an assertion.

The State also contends that an airstrip in Denali National Park and two airstrips in Wrangell-St. Elias National Preserve are RS 2477 rights-of-way. However, the Alaska Region of the NPS and the Alaska Region Solicitor have determined that permanent airstrips are not highways for the purpose of RS 2477 and, therefore, could not be accepted by the State pursuant to RS 2477.

In May 1992, the State finalized regulations on RS 2477 to guide State review of "applications" for RS 2477 rights-of-way and State "certifications" of validity. The regulations imply that the State has authority to adjudicate RS 2477 assertions on federal land. The NPS notified the State that the regulations misrepresent federal authorities by omission and may result in unproductive confrontation and time-consuming litigation.

The State is currently reviewing approximately nine possible RS 2477 rights-of-way under the new regulations. One of the reviews is of an "application" by the first NPS inholder discussed above. The State's preliminary notification of their intent to "certify" that RS 2477 right-of-way has been mailed to the Superintendent of Wrangell-St. Elias National Park and Preserve.

The State also initiated eight reviews of possible RS 2477 rights-of-way in Denali National Park and Preserve. The State expects to notify the NPS of its preliminary determinations for those rights-of-way this winter.

#### Impact: RS 2477 Rights-of-way in Alaska National Park Units

The impact of RS 2477 rights-of-way in Alaska national park units could be devastating. The actual impact will depend on how many potential rights-of-way are validated, what resources they affect, how each right-of-way is used, and to what extent the NPS can manage valid RS 2477 rights-of-way.

##### (1) Number of RS 2477 rights-of-way

It is impossible to state at this time how many possible RS 2477 rights-of-way will be validated. An estimate based on the 1974 State of Alaska trail atlas indicates that as many as 200 rights-of-way could be validated in Alaska national park units. The atlas indicated the following number of possible RS 2477 rights-of-way in each Alaska national park unit:

|                                                |     |
|------------------------------------------------|-----|
| Aniakchak National Monument and Preserve       | 1   |
| Bering Land Bridge National Preserve           | 15  |
| Cape Krusenstern National Monument             | 1   |
| Denali National Park and Preserve              | 30  |
| Gates of the Arctic National Park and Preserve | 7   |
| Glacier Bay National Park and Preserve         | 6   |
| Katmai National Park and Preserve              | 3   |
| Kenai Fjords National Park                     | 1   |
| Klondike Gold Rush National Historical Park    | 2   |
| Kobuk Valley National Park                     | 2   |
| Lake Clark National Park and Preserve          | 5   |
| Noatak National Preserve                       | 0   |
| Sitka National Historical Park                 | 0   |
| Wrangell-St. Elias National Park and Preserve  | 110 |
| Yukon-Charley Rivers National Preserve         | 10  |
|                                                | 193 |





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(2) Affected Resources

Congress established the National Park System to conserve scenic, natural, historic, and wildlife resources for the enjoyment of current and future generations. The Alaska National Interest Lands Conservation Act (ANILCA) specifically established or expanded thirteen of the fifteen Alaska national park units to maintain and protect, in a natural, undeveloped, and unimpaired state: habitat for and populations of fish and wildlife; natural environments; geologic and biological processes; and wilderness character. See ANILCA §§201 and 202.

Possible RS 2477 rights-of-way identified by the 1974 trail atlas cross many miles of undeveloped fish and wildlife habitat, historical and archeological resources, and sensitive coast lines and wetlands. Eleven of the Alaska national park units are bisected by possible RS 2477 rights-of-way some of which are over 100 miles long. Validation of possible RS 2477 rights-of-way in Alaska national park areas would derogate unit values and seriously impair the ability of the NPS to manage the units for the purposes for which they were established.

In six of the Alaska national park units, the 1974 trail atlas identified possible RS 2477 rights-of-way in designated wilderness. In seven other units, the atlas identified possible RS 2477 rights-of-way in areas suitable for wilderness designation. Validation of possible RS 2477 rights-of-way in these areas would derogate designated wilderness resources and impair future designations of wilderness.

(3) Use

Most public highway use of possible RS 2477 rights-of-way in Alaska national park units has been by foot, dogsled, or snowmachine. Aside from irregular access to mines, off-road vehicles (ORV) and road vehicles have rarely been used on possible RS 2477 rights-of-way in Alaska national park units.

Foot, dogsled, and snowmachine travel in Alaska national park units is generally allowed without permit, and where such travel occurs on possible RS 2477 rights-of-way, it does not typically threaten unit resources. The use of ORV and road vehicles is generally prohibited off maintained roads and designated routes. The NPS has determined that these modes of transportation are inconsistent with the values of Alaska national park units.

The State of Alaska has stated that it intends to use RS 2477 to develop a modern transportation network for resource development and extraction. If validated RS 2477 rights-of-way are used for this purpose, they will have a negative impact on Alaska national park units.

(4) Management

The NPS has considerable authority to manage validated RS 2477 rights-of-way to prevent derogation of Alaska national park unit values. The State of Alaska believes that federal land managers would have no control over use of RS 2477 rights-of-way, but federal case law suggests otherwise.

In Sierra Club v. Hodel (Burr Trail), 848 F. 2d 1068 (10th Cir. 1988), the court found the BLM has the authority and responsibility to regulate RS 2477 rights-of-way to prevent undue degradation of federal land. In U.S. v. Vogler, 859 F. 2d 638 (9th Cir., 1988),

and Wilkenson v. Department of the Interior, 634 P. Supp. 1265 (D. Colo. 1986), the courts found that the NPS can regulate RS 2477 rights-of-way. The Vogler court stated that the Organic Act of the NPS [16 USC §1] and the Mining in the Parks Act [16 USC §1902] authorize the NPS to prevent derogation of park values.

(5) Conclusion

There are 200 possible RS 2477 rights-of-way in Alaska national park units. Many of these possible rights-of-way are extensive and could impair scenic, natural, historic, wildlife, and wilderness resources. ORV or road-vehicle transportation on validated RS 2477 rights-of-way will derogate Alaska national park unit values. The NPS may be able to prevent such derogation pursuant to applicable law and regulations if current federal case law withstands future challenge.

Impact: Access to Alaska National Park Units

Access to Alaska national park units does not currently rely on RS 2477 rights-of-way. Future planning may identify RS 2477 rights-of-way that could provide such access. However, the Alaska Region of the NPS does not expect that this will be a common circumstance.

Alternatives: Public Highways in Alaska National Park Units

(1) Unimproved Rights-of-way

Existing law and regulations provide an alternative to RS 2477 rights-of-way for public transportation by foot, dogsled, and snowmachine. Existing law does not provide such an alternative for transportation by ORV.

Access across Alaska national park units by foot, dogsled, and snowmachine (during periods of adequate snow cover or frozen river conditions) was authorized by Congress [ANILCA §1100 (a)]. Most of the possible RS 2477 rights-of-way identified in the 1974 trail atlas are associated with such modes of transportation and have never been used in any other manner.

ORV use is generally prohibited in Alaska national park units by current law. Furthermore, a study in Wrangell-St. Elias National Park and Preserve documented that ORV use causes resource damage at even the lowest traffic levels.

(2) Improved Rights-of-way

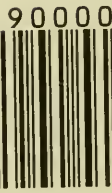
Title XI and direct Congressional intervention provide two alternatives to RS 2477 rights-of-way for establishing improved rights-of-way in Alaska national park units.

The NPS has no general authority to approve improved public highways across a national park unit unless the highway would serve NPS administration [16 USC §8], would be within the Federal-aid highway system [23 USC §317], or, in Alaska, would be necessary to provide adequate and feasible access to inholdings for economic and other purposes [ANILCA §1110 (b)]. However, under Title XI of ANILCA, applications for improved public highways across Alaska national park units must be processed by the NPS and submitted to the President. If the President approves an application and Congress agrees, the NPS must issue a right-of-way permit for that application.

Congress could also legislate improved access across Alaska national park units. Congress has done this four times in the recent past: Public Law 99-96 authorized a mining road in Cape Krusenstern National Monument; ANILCA authorized an existing winter transportation route across Bering Land Bridge National Preserve; and ANILCA mandated future improved rights-of-way across Gates of the Arctic National Preserve and Yukon-Charley Rivers National Preserves.



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